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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 389

THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

FILED SEPTEMBER 10, 1929

(34,520)

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[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 389

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, a Corporation, Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, The Chesapeake and Potomac Telephone Company, a body corporate, respectfully represents:

The Decision Below

On June 10, 1929, the Court of Claims entered special amended findings of fact and a conclusion of law, dismissing the petition of The Chesapeake and Potomac Telephone Company, in a suit filed in that Court, No. A-233. The decision of the Court of Claims has not yet been reported. It was concurred in by two of the justices of the Court, while the chief justice filed a dissenting opinion, which was concurred in by the remaining justice.

Summary Statement of the Matter Involved

This claim, which was filed by The Chesapeake and Potomac Telephone Company under the Act of Congress of [fol. 2] March 2, 1919, (40 Stat. 1272), known as the Dent Act, is for the recovery of the difference between the cost of a very large telephone switchboard and of the installation thereof for the War Department during the World War, and the amount realized from the parts when the switchboard was removed.

From June, 1908, to February, 1917, a switchboard with a capacity to 280 lines had been sufficient to supply the War Department. Then, due in part to Mexican border troubles and Germany's declaration of its policy with respect to unrestricted submarine warfare, the telephone needs of the Department began to increase, and larger equipment was then installed, and thereafter increased from time to time. By November, 1917, (war having been declared seven months previously), the officials of the telephone company informed the officials of the War Department that the requirements of the Department would exceed the capacity, then at its maximum, of the type of switchboard then installed, and that it would be necessary to provide a switchboard equipment larger than any previously designed and used for even the largest private branch exchange then existing.

The War Department thereupon erected a building, specially designed and constructed for the purpose of housing such switchboard equipment. The telephone company submitted plans to the Secretary of War for the purpose of securing approval of the proposed switchboard and equipment and its layout in the proposed building with relation to the floor space, before placing a final order for the construction thereof. The endorsements with which these plans were returned to the company indicated approval thereof.

At that time there was in effect a General Supply Contract, made by the Secretary of the Treasury with the telephone company, under authority of the Act of June 17, [fol. 3] 1910, providing for the furnishing of telephone equipment and service to the various Government Departments and Bureaus in Washington, for the fiscal year ending June 30, 1918. This contract provided a rental of $24 per year for a private branch exchange switchboard. Before beginning the installation of the new switchboard in the new building, the telephone company, through its proper official, informed John C. Scofield, Assistant to the Secretary of War and Chief Clerk of the War Department, and Arthur D. Scovell, director of telephones for the War Department, that the telephone company would expect the Government to pay the cost of the new switchboard less salvage.

The new board was expedi-ously and properly installed, and accepted and used by the War Department, beginning in June, 1918. The total cost to the company of the board and its installation was $401,113.34. It was of the type installed in a central-office exchange, and was of sufficient capacity to serve as a telephone exchange for a city of from 40,000 to 100,000 inhabitants. After the armistice the Department ordered portions of the board removed from time to time, the last being removed about the end of 1920. The claim was presented to the Secretary of War for the cost of the board and its installation, less the salvage obtained therefor upon its removal; it was referred by him to the Board of Contract Adjustment, which rejected it, and on appeal to the Secretary of War, the decision of the Board was affirmed. Then suit was filed in the Court of Claims, which, by a court divided three to two, concluded that the telephone company was not entitled to recover, and dismissed its petition.

[fol. 4] The opinion of the Court, while not entirely clear, apparently adopts the position urged by the Government that the telephone company was obligated to furnish and install the switchboard in question, costing it over $400,000, for the rental of $24 per year provided by the General Supply Contract then in force, for the opinion states that the act under which this contract was made gave the Secretary of the Treasury "sole authority to make contracts for supplies for the various departments of the Government, including telephone service", that under the General Supply Contracts in question, "the plaintiff undertook to install and maintain such telephone equipment, at its own risk and expense, as would be required by the various departments of the Government in the District of Columbia, and to furnish service in connection therewith," and that "the department never recognized the claim of an agreement with the plaintiff to pay for the switchboard other than by way of the usual rental provided for in the general supply contract."

The opinion further states: "It is necessary for recovery under the Dent Act that a party making a contract should have authority so to do, and in this case there is a complete absence of proof of authority."

It is not stated, however, whether this conclusion is based

upon the supposed "sole authority" of the Secretary of the Treasury, by General Supply Contracts, to contract for so large and unusual a switchboard for the War Department, or upon the conclusion that Mr. Scofield, who ranked next to the Secretary of War himself in control of the telephone service of the Department, and Mr. Scovell, the director of telephones, were without contractual authority, thus leaving the Secretary of War himself as the only re-[fol. 5] sponsible official.

The opinion of the Court also states that "The findings show no express contract and no facts from which a contract could be implied," and further that "Mr. Scofield, who, if anyone under the Secretary of War, had authority to make such a contract, never stated to plaintiff's representative that the War Department would pay for the installation of or losses on the new switchboard." Yet the findings show clearly the very large and unusual character of the swicthboard necessary to meet the needs of the War Department in the crisis then existing, the notice given Mr. Scofield and Mr. Scovell that the Government would be expected to pay the cost less salvage, approval of the board, and its acceptance and use by the War Department. It seems clear, therefore, that in view of these express findings, the statement in the majority opinion that there are no facts from which a contract can be implied in fact, is based upon the erroneous view that an express promise to pay is essential to such a contract.

Reasons Relied on for the Allowance of the Writ

1. The Court of Claims has construed Section 4 of the Act of June 17, 1910 (36 U. S. Stat. L. 468,531), which gives the Secretary of the Treasury authority to make contracts for supplies for the various Departments of the Government, as conferring upon the Secretary of the Treasury *sole* authority to make a contract for so unusual a switchboard as is here involved, for the use of the War Department, in entire disregard of the following proviso therein:

"*Provided*, That the articles intended to be purchased in this manner are those in *common use* by or suitable to the [fol. 6] *ordinary* needs of *two* or *more* such departments or establishments; but the said Secretary shall have discretion

to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased." (Italics ours.)

It is of great importance that this Federal Statute and the authority thereby conferred, as well the limitations on such authority, should be clearly and correctly construed and defined, not only for the protection of those contracting with the Government, but also for the guidance of the public officials concerned therewith.

2. The Court of Claims has stated in the majority opinion that there was no contractual authority in the officials of the War Department with whom the telephone company dealt, in spite of the fact that the Court found that one of these officials, Mr. Scofield, Assistant to the Secretary of War and Chief Clerk of the War Department, ranked next to the Secretary himself in control of the telephone service, that Mr. Scovell, under appointment by the Secretary of War, was director of telephones for the War Department, having immediate charge of the telephone service and traffic of the Department, and that the War Department did not finally terminate its use of the switchboard until more than a year and a half after the claim for the cost, less salvage, was presented to the Secretary of War and by him referred to the Board of Contract Adjustment.

For a discussion of the contractual authority of the above officials, we respectfully refer the Court to the dissenting opinion of Chief Justice Booth, concurred in by Justice Moss.

If the decision of the Court is correct, then it necessarily follows, either that no one in the War Department had [fol. 7] authority to contract for the new switchboard, which was then vitally necessary for the efficient functioning of the War Department, or that such authority was limited to the Secretary of War in person, at a time when the Secretary was overburdened with the responsibilities placed upon him by the World War. Furthermore it would follow from this decision that the Government may repudiate a contract of its agent while accepting and retaining the benefits thereunder, without even the obligation to pay reasonable compensation therefor.

It is of great importance, both to those contracting with the Government and to Government officials, that, if the conclusion of the Court of Claims be correct, it should be so stated by this Court, or if erroneous, that it should be corrected.

3. The Court of Claims further based its decision upon the ground that no facts were shown from which a contract or agreement could be implied in fact, as distinguished from an agreement implied in law. The findings show, however, the need of the War Department for greatly increased telephone facilities; the statement by the telepohne company to the War Department officials in control and charge of the telephone service that a much larger and specially constructed switchboard was necessary and that, if to be furnished, the Government would have to pay the cost, less salvage; the construction by the Government of a building especially designed for the board and equipment; and approval by the Department of the proposed switchboard and equipment, which were installed by the company and accepted and used by the War Department. Here was an offer by the company and an acceptance by the War Department, which received the benefit thereof. This is all [fol. 8] that is necessary for the implication in fact of a contract and promise to pay.

Again we respectfully refer this Court to the dissenting opinion of Chief Justice Booth.

It is of great importance that so fundamental a principle in the law of implied contracts should not now be questioned or disturbed.

Furthermore it is of great importance that those who deal with our Government, especially in such a crisis as that existing during the World War, should have a reasonable expectation of receiving just compensation for the benefits furnished to and received by the Government and should not be defeated in this expectation by mere informalities in transactions conducted in a time of such urgency and stress. Nor should the Government be allowed to disavow the burdens while retaining the benefits of an agreement because of its informal character.

While the majority opinion correctly states abstract principles of law with respect to recovery under the Dent Act, yet those principles were not properly applied by the court

in this case, and the court should have given a recovery under that Act or awarded reasonable compensation irrespective thereof.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Claims, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. A-233, The Chesapeake and Potomac Telephone Company, a corporation, vs. the United [fol. 9] States, and that the said judgment of the Court of Claims may be reversed by this Honorable Court, and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

The Chesapeake and Potomac Telephone Company, by Stanton C. Peelle, C. F. R. Ogilby, Paul E. Lesh, Dale D. Drain, Jerome F Barnard, Counsel for Petitioner.

[fol. 1] In Court of Claims of the United States

No. A-233

The Chesapeake and Potomac Telephone Company, a Corporation,

vs.

The United States

1. History of Proceedings

On July 21, 1921, the plaintiff filed its original petition.

On September 20, 1921, the defendant filed a general traverse to said petition.

On August 18, 1925, by leave of court, the plaintiff filed its amended petition.

Said amended petition is as follows:

II. Amended Petition—Filed August 18, 1925

To the Honorable the Justices of the Court of Claims of the United States:

The claimant, The Chesapeake and Potomac Telephone Company, respectfully represents:

1. The claimant is a corporation, duly created, organized and existing under and by virtue of the laws of the State of New York, and having and maintaining offices, and conducting its business as a telephone company, in the District of Columbia; and, at all times hereinafter mentioned was, and still is, so engaged in the conduct of its business, and in the place mentioned.

[fol. 2] 2. This claim is made under the provisions of the Act of Congress, approved March 2, 1919, entitled:

"An Act to provide relief in cases of contracts connected with the prosecution of the war, and for other purposes."

3. Prior to the recent war, and at the time thereof, there was installed and in use in the State, War and Navy building a telephone exchange, and the latter was enlarged, from time to time, to meet the constantly increasing needs of that service, until the point was reached where further expansion was impossible, except only by securing additional housing facilities. Thereupon, and as a result of the necessities of the situation mentioned, there was erected, by and on behalf of the United States, a building known as No. 1723 "F" Street, N. W., Washington, D. C., for the purpose of accommodating the installation of a telephone switchboard, and associated equipment, of sufficient size and capacity to meet the needs and requirements of the Government incident to the state of war in which it was then involved and engaged.

4. And claimant further shows that, thereupon, and in or about the month of December, 1917, the defendant, acting therein by and through its duly authorized officers and agents in that behalf, requested plaintiff to install and erect, in the certain building above mentioned, a telephone switchboard, with associated equipment, said switchboard to be of size and capacity to accommodate twenty-five (25)

sections, having three (3) positions as to each; and faithfully undertook, promised and agreed to reimburse and pay claimant the reasonable cost thereof and of its installation and subsequent removal.

[fol. 3] 5. And claimant says that, being so thereunto requested, as hereinaforesaid, it thereupon purchased what is known as a Special No. 1, 92 Jack telephone switchboard, having twenty-five (25) sections of three (3) positions each, arranged with automatic flashing recall, and equipped for 7,200 extension lines, 180 outgoing trunks, 160 tie lines, and 30 private toll lines, together with frames, rack, cabling, power plant, desks and miscellaneous apparatus; the same being, at that time, the largest telephone switchboard of special or private installation in the world; and that, in and about the purchase and installation thereof, the claimant reasonably expended the sum of, to wit, Four Hundred and One Thousand, One Hundred and Thirteen Dollars and Thirty-four Cents ($401,113.34).

6. Claimant further shows that the above switchboard and equipment were installed and put in service, to the extent of some forty-five (45) positions, on or about July 1, 1918, and the remaining positions in or about the month of September, 1918.

7. Claimant further states that, after the signing of the armistice, and from time to time, certain of the sections comprising the switchboard aforesaid were successively ordered by the defendant to be discontinued, some ten (10) of the sections having been so ordered to be discontinued prior to February 20, 1919, and, thereafter, during the year 1920, all of the remaining sections were so ordered to be discontinued.

8. Claimant further states that, in order to keep down the loss and damage, as far as reasonably might be, incident to the purchase and installation of the switchboard and equipment aforesaid, and incident to the removal [fol. 4] thereof, as so directed and ordered by the defendant, as aforesaid, it made sale of so much and such parts of said switchboard and equipment as it was found possible to sell at reasonable and proper prices; that the amount

realized from such sales, less the reasonable cost of the removal of the switchboard and equipment, amounted to the sum of Two Hundred and Six Thousand, Three Hundred and Fifteen Dollars and Seventy-nine Cents, ($206,315.79), with which amount claimant credits defendant, upon the aforesaid expenditure by claimant of Four Hundred and One Thousand, One Hundred and Thirteen Dollars and Thirty-four Cents, ($401,113.34). Claimant further credits defendant upon said expenditure with the following items, namely: The sum of Twenty-two Thousand, Two Hundred and Thirty-two Dollars and Seventy-eight Cents, ($22,232.78), the amount of depreciation on said switchboard and eqipment allowed and paid by defendant to claimant during the period of the Government's control of claimant's telephone system, and the sum of One Thousand, Six Hundred and Eighty-two Dollars and Ninety-seven Cents, $1,682.97), the amount paid by defendant to claimant as revenue for the use of said switchboard and the multiple jacks connected therewith during the time the same were in use by defendant. The three credits aforesaid aggregate the sum of Two Hundred and Thirty Thousand, Two Hundred and Thirty-one Dollars and Fifty-four Cents, ($230,231.54), which, deducted from the aforesaid sum of Four Hundred and One Thousand, One Hundred and Thirteen Dollars and Thirty-four Cents ($401,113.34), leaves a net loss sustained by claimant, incident to the aforesaid transaction, of One Hundred and Seventy Thousand, Eight Hundred and Eighty-one Dollars and Eighty Cents, ($170,881.80).

[fol. 5] 9. Claimant further states that, in accordance with the provisions of the certain Act of Congress, hereinabove referred to, and within the time therein prescribed, it submitted its application and claim for reimbursement to the Secretary of War, and that such proceedings were had therein as that the said Secretary failed to offer any adjustment or payment of compensation which claimant was willing to accept, and failed and refused to offer any adjustment, payment or compensation, and rejected and denied the claim of plaintiff in its entirety.

10. The claimant is the sole owner of the claim embraced herein, and no other person or concern has any interest

therein. No assignment or transfer of said claim, or of any part thereof or interest therein, has been made, and no action, other than as herein aforesaid, has been had on this claim in Congress, or in any of the Departments of the Government of the United States; the claimant is a citizen of the United States, and has at all times borne true allegiance to the Government thereof, and has not, in any way, voluntarily aided, abetted or given encouragement to rebellion against said Government; and, finally, claimant alleges that it is justly entitled to the amount herein claimed from the United States, after allowing all just credits and off-sets.

Wherefore, the premises considered, the claimant prays judgment against the United States in the sum of One [fol. 6] Hundred and Seventy Thousand, Eight Hundred and Eighty-one Dollars and Eighty Cents ($170,881.80).

The Chesapeake and Potomac Telephone Company, by A. E. Berry, President. Attest: John F. Slaven, Asst. Secretary. (Seal.) Peelle & Ogilby, Attorneys for Claimant.

Duly sworn to by A. E. Berry. Jurat omitted in printing.

[fol. 7] III. General Traverse—Filed Oct. 17, 1925

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

IV. Further Proceedings Had in Case

On December 7 and 8, 1927, this case was argued and submitted on merits by Mr. Stanton C. Peelle, for plaintiff, and by Mr. Heber H. Rice, for defendant.

On February 20, 1928, the court filed findings of fact, conclusion of law, dismissing petition, with opinion by

Graham, J., and dissenting opinion by Booth, J. Judgment was entered against plaintiff in the sum of $1,129.97, for printing the record in this court.

On April 20, 1928, the plaintiff filed a motion for a new trial.

On October 8 and 9, 1928, said motion was argued and submitted by Mr. Stanton C. Peelle, for plaintiff, and by Messrs. J. J. Lenihan and H. H. Rice, for defendant.

On June 10, 1929, the court entered the following order on said motion:

Order

It is ordered this 10th day of June, 1929, that the plaintiff's motion for new trial be and the same is overruled.

The former findings are vacated, set aside and withdrawn, and amended findings are this day filed, the judg- [fol. 8] ment and opinion to stand, with a dissenting opinion by Chief Justice Booth now filed, in which Judge Moss concurs.

By the Court.

V. **Amended Special Findings of Fact, Conclusion of Law, Opinion of the Court by Graham, J., and Dissenting Opinion by Booth, Ch. J.**—Filed June 10, 1929

This case having been heard by the Court of Claims upon the report of a commissioner and the evidence, the court makes the following

AMENDED SPECIAL FINDINGS OF FACT

I

The Chesapeake and Potomac Telephone Company, plaintiff, is a corporation organized and existing under the laws of the State of New York, maintaining its offices and conducting its business as a telephone company in the District of Columbia, and at all times hereinafter mentioned was, and now is, so engaged in the conduct of said business in the District of Columbia.

II

On June 23, 1916, plaintiff entered into a contract, known as the General Supply Committee contract, with the Secretary of the Treasury, who was exclusively authorized by law to make such contracts (Section 4, act of June 17, 1910, 36 Stat. 468, 531), which provided for the telephone service to be furnished by plaintiff to the various departments, offices, and establishments of the Government in the District of Columbia, for the fiscal year ending June 30, 1917. On May 18, 1917, the same parties entered into a similar contract providing for like telephone service for the fiscal year ending June 30, 1918. The chief revenue received by plaintiff from the War Department under the annual General Supply Committee contracts consisted in mileage charge upon station lines, charges for telephone stations, and local messages. Plaintiff furnished the necessary private branch exchange switchboards at a nominal rental of $24 per annum, it being the policy of the plaintiff to charge merely a nominal rental for such equipment, while the chief revenue was being derived from other sources. The Government at all times paid the wages of the operators at the War Department switchboard.

[fol. 9] III

In the renewal of the General Supply Committee contracts for the year beginning July 1, 1917, the following provisions were contained:

"For and in consideration of the payments to be made as hereinafter provided for, the party of the first part (C. & P. Telephone Company) does hereby covenant and agree to and with the party of the second part (Secretary of the Treasury of the United States) that said party of the first part will, at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia, for a term of one year beginning July 1, 1917, and ending June 30, 1918, at the following rates:

"Item 20000.—That said company will install, equip, and maintain such telephone equipment as may be required in the District of Columbia, and furnish service in connection

therewith at the following rates during the fiscal year 1918:

"(a) Common battery private branch exchange switchboards, including one operators set, of telephones for each operator's position, each, per annum, $24.00.

"Item 20200.—At the request of the department the company will change the location of switchboards or telephone stations of a No. 2 private branch exchange system, charging the department therefor the cost of material, labor, transportation of employees, and supervision. Any changes in the location of switchboards which the company may make for its own convenience or in the renewal of equipment will be done without cost to the department.

"Item 20350.—Should additional service or equipment be required by any of the departments or establishments of the Government such additional service or equipment will be furnished at the rates named herein. Should any of the departments or other establishments of the Government discontinue the use of any equipment or service, a like reduction will be made from the date such equipment is discontinued, provided the company is given not less than 10 days' notice of the purpose to discontinue."

The above provisions were the same as the corresponding provisions in the General Supply contract for the previous year ending June 30, 1917.

IV

On September 25, 1918, the Secretary of the Treasury entered into a contract with plaintiff, prepared by the General Supply Committee, for telephone service for the fiscal year beginning July 1, 1918, which contained, among other things, the following provisions:

"The company does hereby covenant and agree to and with the subscriber that the company will, at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia for a term of one year beginning July 1, 1918, and ending June 30, 1919, at the following rates:

"The company will install, equip, and maintain such telephone equipment as may be required by the subscriber in

[fol. 10] the District of Columbia, and furnish service in connection therewith at the annual rates indicated opposite each item during the fiscal year ending June 30, 1919: * * *

"Item 20000.—Private branch exchange system:

(a) Switchboards:

(1) Common battery private branch exchange switchboards, including one operator's set of telephones for each operator's position, limited to twenty station drops $24.00

(2) For subswitchboards furnished in connection with private branch exchange service in the same building or on the same Government reservation with the main switchboard for use in providing night service, etc., with 1 operator's set of telephones for each operator's position, viz—

(aa) Cordless switchboard with a capacity of 3 trunk lines and 7 stations, with operator's set 24.00

(bb) Cord switchboard with a capacity of 10 trunk lines and 30 stations equipped with 20 station drops, with operator's set 24.00

(b) Telephone stations, includes interior wiring to connect stations with private branch exchange switchboards or subswitchboards, except when the installation is exceptionally expensive, due to unusual conditions, such as reinforced concrete buildings, etc., or when the system is not likely to be reasonably permanent, in which cases an installation charge will be made:

(1) For first 10 telephone stations, each .. 6.00

(2) For second 10 telephone stations, each 4.80

(3) For telephone stations in excess of 20, each 3.60

(4) For station terminal equipment at the private branch exchange switchboard, in excess of 20 drops, each 1.20

"Should additional service or equipment be required by any of the departments or other establishments of the Government such additional service shall be furnished at the rates named herein, or at the rates in effect at the time such additional service or equipment is provided.

"Should the subscriber desire any other service or equipment not specified herein, the company's rates and regulations filed with the Public Utilities Commission of the District of Columbia will apply.

"Should any of the departments or other establishments of the Government discontinue the use of any equipment or service within the period of one month from the date of its installation, the minimum charge for such equipment or service shall be for the period of one month at the rates applicable thereto.

"The Secretary of the Treasury, by accepting rates and terms herein stated on behalf of the subscriber, agrees that the equipment now in service is covered by this contract."

V

Under the authority of the act of March 4, 1913, the Public Utilities Commission, thereby created, adopted schedules of rates to be charged for telephone service and equipment in the District of Columbia, thereafter modifying certain of said rates from time to time, as the commission deemed proper. The annual charge for a private branch exchange switchboard, including operator's set of telephones, was fixed by the aforesaid commission at $24 throughout the period involved in this claim.

Sheet No. 4, Tariff No. 22, in force from June 1, 1916, to June 30, 1923, provided:

[fol. 11] "Rates for Equipment not Otherwise Provided for

"When a subscriber desires a type of equipment for which provision is not otherwise made, a rate will be quoted based on the initial cost of such equipment, the installation charge, and the estimated cost of maintenance."

There was also in effect from February 1, 1916, to June 30, 1923, a tariff or rate schedule of the commission which provided, in reference to private branch exchange systems:

"When the installation is exceptionally expensive, due to unusual conditions, such as reinforced-concrete buildings, etc., or when the system is not likely to be reasonably permanent, an installation charge is made."

VI

In June, 1908, plaintiff had installed a special three-position multiple private branch exchange No. 4 switchboard for the War Department, in room 245 of the State, War, and Navy Building at Washington, D. C. Said switchboard was equipped for 280 lines, 20 trunks, and 30 tie lines; and when it was installed, about 180 lines were put into service. In February, 1917, the number of lines had not increased to more than 257, and this private branch exchange switchboard had continued to be sufficient to supply the War Department with telephone service from June, 1908, to February, 1917.

VII

Due in part to the Mexican border troubles and more especially following the announcement by the German Government on January 31, 1917, of its policy with respect to unrestricted submarine warfare and the necessary pre-war activities of the United States Government that followed this announcement, the telephone service handled through this switchboard continued to increase in such proportion that additional switchboard equipment was required. To meet this demand for increased facilities a five-position multiple No. 4 private branch exchange switchboard was installed for the War Department in the same room and put into service on March 23, 1917, replacing the three-position switchboard theretofore in service.

VIII

The requirements of the War Department for telephone service continued to increase rapidly, so that in August, 1917, it was necessary to install four additional positions of multiple No. 4 private branch exchange switchboard, making a total of nine positions. Before these four additional positions were installed, however, it became evident

to the plaintiff that the War Department's need for telephone service would exceed the capacity of the No. 4 multiple type of private branch exchange equipment, and accordingly plaintiff ordered a private branch exchange equipment of the No. 604 type, the largest and most modern type of private branch exchange equipment then on the market. The initial installation of this No. 604 type priv-
[fol. 12] ate branch exchange equipment consisting of 12 operators' positions, with equipment for 1,000 lines, was installed in rooms 241 and 243 in the State, War, and Navy Building and placed in service on October 1, 1917, replacing the nine positions of No. 4 switchboard in room 245.

IX

The War Department's requirements for telephone service continued to grow, and accordingly additions were made to the No. 604 private branch exchange equipment, so that by November 1, 1917, it had been increased to 15 operators' positions, with equipment for 1,300 lines; by December 15, 1917, to 18 operators' positions and 1,600 lines; and by January 9, 1918, to 20 operators' positions and 2,000 lines, the normal capacity of the equipment. It then became necessary to crowd additional equipment into the switchboard until the lines had been increased to 2,400 with a corresponding increase of operators' positions, and then to resort to the expedient of providing other operators' positions for local trunking, thus making it necessary for a large proportion of the local calls to be handled by two operators, which resulted in increased cost of operation to the Government, and in a less speedy and less accurate service. By such changes, this No. 604 type of private branch exchange equipment was expanded during the winter and spring of 1918 until it consisted of 42 operators' positions, including trunking positions, with equipment for 4,200 lines, thus making it a highly specialized private branch exchange switchboard. This was practically the limit to which this equipment could be expanded.

X

By November, 1917, the officers of the plaintiff company foresaw that, due to war conditions, the requirements of the

War Department for telephone service were going to exceed the line capacity of the No. 604 private branch exchange equipment, and that it would be necessary to provide a switchboard equipment larger than that previously designed and used for the largest private branch exchange then existing.

XI

Plaintiff informed the officials of the War Department of this and of the floor space which would be required for such equipment, and for furnishing adequate telephone facilities for the department; but as no such space was then available, the Secretary of War appointed a committee to consider the space question. As a result, the War Department erected a separate building at No. 1723 F Street N. W. to house the new equipment. The building was designed by an architect employed by the Government, the floor plans for which were submitted by plaintiff. The building was erected by a contractor employed by the Government. The Government paid for the erection of the building to the extent of $130,000, the plaintiff contributing the balance of about $8,000 to avoid any impairment in the construction. [fol. 13] Plaintiff had always theretofore provided at its own expense the necessary telephone switchboards and equipment for use at the War Department, and the defendant had always provided the necessary space for such switchboards and equipment.

XII

Honorable Newton D. Baker was Secretary of War at that time, and John C. Scofield was assistant to the Secretary of War and chief clerk of the War Department. Mr. Scofield, in addition to his other duties, had supervisory charge with regard to civilian employees and assigning buildings and getting space for different activities; he also had supervisory charge of the estimates and expenditures from the appropriation "Contingent expenses of the War Department." At the beginning of the war he had supervision of the telegraph and telephone division, and ranked next to the Secretary of War in control of said service, and on December 18, 1917, Arthur D. Scovell, who had much ex-

perience as a traffic manager of the New York Telephone Company, which, together with plaintiff, were constituent member of the Bell system, was appointed by the Secretary of War and assumed his duties as director of telephones for the War Department, having immediate charge of the telephone service and traffic of the department. He had administrative power inside the War Department, could make recommendations, had charge of the telephone employees, could switch them around and tell how to make their service effective, but had no power to bind the Government in the matter of contract and was not in any sense a contracting officer. Mr. Scovell was there to get the best service as quickly as possible, and the Secretary of War supported him in that. There were items of work or installations which were ordered for the telephone service of the War Department by Mr. Scovell while he was director of telephones, without any written order given at the time, but payments for which were subsequently made. Mr. Scovell was in immedate charge of the telephone service of the War Department, and this service was under the general direction of Mr. Scofield.

About the time of the beginning of the World War, plaintiff, anticipating an abnormal increase in the telephone business at the War Department called its engineers together and planned to handle the prospective increase in business. Soon thereafter plaintiff asked the War Department for additional space in which to install telephone facilities. Plaintiff also secured said A. D. Scovell for the War Department, to become the Government's "dollar-a-year" man, in connection with the War Department's telephone service. His salary, aside from said dollar a year, was paid by plaintiff or its associate, the New York Telephone Company, throughout his tenure of service from December 18, 1917, to November 14, 1918. Plaintiff had representatives from different American Telephone & Telegraph companies on hand in Washington to lend their assistance in co-operating with plaintiff and to assist plaintiff in procuring the switchboards and equipment. The said American Telephone & Telegraph companies considered the problem of increased telephone service at the War Department to be largely its own problem.

[fol. 14] XIII

When, in November, 1917, the officials of the plaintiff foresaw the necessity of installing a larger type of switchboard if adequate telephone service was to be furnished to the War Department these officials conferred with Mr. Scofield and Mr. Scovell and also with the committee referred to in Finding XI as to the space and character of building which would be required to house it properly. The War Department decided to erect a separate building for the purpose, and plaintiff's officials cooperated with the War Department in the preparation of the plans for such building. As it was vital that the new telephone service should be provided at the earliest possible moment, plaintiff, as soon as the type of Switchboard was tentatively determined upon, on or about December 27, 1917, ordered the manufacture of the stock parts for the exchange, such as multiple jacks and the like, which had to be made up by the thousands, but not such parts as might have to be changed or the order for which could not be canceled, if such tentative plans for such new switchboard were abandoned. [Plaintiff also prepared blue prints showing the proposed floor plans and the location thereon to scale of the various parts of the proposed switchboard. These blue prints indicated the extensive character of the various parts of the equipment.]

Mr. Charles T. Clagett, who was plaintiff's district manager at the time, had charge of its business office, looked after collections, the ordering of telephones, and all business pertaining to the public, including the Government's contractual relations with the plaintiff, consulted with plaintiff's chief engineer, Mr. C. F. Sherwood, who had been sent down from the New York Telephone Company to take charge of the Government situation and to whom Mr. Mr. Clagett reported, and told him the whole installation ought to be held up until they got a written order. Mr. Sherwood objected to such a course, told Mr. Clagett that they wanted to do everything possible for the Government, and would take their chances of getting paid, and notified Mr. Clagett to go ahead with the installation. In January, 1918, plaintiff advised Mr. Scofield, and prior to installing the same gave a similar notice to Mr. Scovell, that it expected the Government to pay the cost of the new switch-

board less salvage, but neither the Secretary of War nor Mr. Scofield at any time approved payment of the same.

The proposed central-office type of switchboard and equipment were approved orally by Mr. Scovell, who considered it the best to be had and the only switchboard and equipment which would meet adequately the needs of the War Department. In addition, plaintiff submitted to the Secretary of War blue prints showing, on the floor plans of the building which the Government proposed to erect, the switchboard and equipment, and location thereof, which plaintiff proposed to install therein. Plaintiff's letter of transmittal, addressed to the Secretary of War under date of December 31, 1917, said, in part:

"We will appreciate hearing from you at your earliest convenience, since in order to save time, we are having the factory proceed with the manufacture of the new War Department switchboard in accordance with the accom-
[fol. 15] panying layout, and should any changes therefrom be desired, the factory should be informed at once."

On January 2, 1918, this letter was referred by Mr. Scofield to the cantonment division for consideration and report. The cantonment division, with the indorsement, "So far as can be determined, the arrangement as suggested by the telephone company is satisfactory," referred the same to Major Starrett, who, under date of January 14, 1918, wrote returnig the plans to plaintiff, with said indorsements, and saying, "To me the indorsements already made seem sufficient authorization for you to proceed." Thereupon plaintiff gave final orders for the completion of the proposed switchboard and equipment. These plans were submitted by plaintiff to the Secretary of War not only for the purpose of learning definitely the floor plans of the proposed building, but also for the purpose of securing approval of the proposed switchboard and equipment.

XIV

Plaintiff installed the new No. 1 switchboard and equipment in said new building, and transferred the telephone service from the old switchboard in the State, War, and Navy Building to the new switchboard in the new building,

completing the installation and putting the new board into service on June 22, 1918. The new switchboard consisted of fifteen sections of three positions each, or forty-five operator's positions, serving about five thousand extension lines, 180 central office trunks, 140 tie lines, and 30 toll lines. By the time of the armistice, plaintiff had installed 30 additional operator's positions, with associated equipment.

An extension line is a line from a private branch exchange switchboard to one or more stations or telephones. A trunk line connects the central office with a private branch exchange, a tie line connects two private branch exchanges.

The new switchboard was larger, more costly, and had a much larger capacity than an ordinary private branch exchange switchboard. It was of the type installed in a central-office exchange. The board installed served 65 different buildings in the District of Columbia, located in various localities, where the War Department was housed.

It had a complete power plant of its own and was of sufficient capacity to serve as a telephone exchange for a city of from 40,000 to 100,000 inhabitants. It was connected by direct tie lines with the switchboards of nearly all other Government departments, and also directly with points outside Washington, some as far away as Ohio, thus putting the department in direct communication, without going through the central office exchange, with all these points mentioned.

XV

After the signing of the armistice the War Department's need for telephones decreased and beginning in the early part of 1919, upon the several orders of the War Department therefor, the plaintiff from time to time removed various sections of the new switchboard, until about the first of January, 1921, it was completely removed. Service for the War Department, upon discontinuance of service at 1723 F Street N. W., was, by order of the War Department, furnished through the Navy Department switchboard.

[fol. 16] XVI

In transferring the telephone service to the new building, plaintiff, on December 3, 1918, submitted to the War Department a bill for $35,917.05 net, stating that it covered

the cost of the labor and material involved in accordance with the provisions of the General Supply Committee contract. This bill was paid by the War Department on December 13, 1918.

Plaintiff presented and collected its bills for rental upon both the old switchboard and the new switchboard at the same nominal rental of $24 per year for the switchboard proper, and increased rates for the lines and stations in the General Supply contract. An additional charge against the switchboard for multiple jacks was made, amounting to $10,153.56, and was paid to plaintiff by the War Department.

XVII

The new switchboard was larger and of a different type from the old switchboard (and the same may be said of all preceding switchboards), the purposes for which they were used were identical, being used as a private branch exchange switchboard. As to size, both were described as the largest private branch exchange switchboard in the United States. The cost of the new board exceeded the cost of the old board by about twenty-five per cent per position. Such features of the new switchboard as the power plant, batteries, dynamos, generators, and "A" and "B" boards, were also used in the old No. 604 switchboard in the State, War, and Navy Building. These boards possessed the same general features and were both common battery private branch exchange switchboards.

XVIII

Plaintiff was paid special increases in rates in accord with the rates fixed by the Public Utilities Commission of the District of Columbia, for telephone service from the Government for its general supply contract for the fiscal year beginning July 1, 1918, which rates were continued during subsequent years. The revenue derived by plaintiff from new items inserted in said contract after the installation of the new switchboard and covering the period from July 1, 1918, to November 10, 1920 (during which time the new switchboard was in service), was ($52,224 and the extra revenue derived from the 16⅔ per cent increase in the old mileage rates was $46,264, making a total of $98,488 for a period of less than 2½ years.

XIX

Plaintiff collected from the Government under the Government control agreement for the full year of such Government control ending July 31, 1919, an estimated annual carrying charge of 24.6 per cent of the book value of the switchboard, amounting to $78,939, less the nominal rentals actually received.

[fol. 17] XX

The War Department did not recognize the claim of an agreement with plaintiff to pay for the switchboard other than by way of the usual rental provided for in the General Supply Committee contract.

Mr. Scofield never represented to plaintiff's representatives that the War Department would pay for the installation or costs of or losses on the new switchboard, nor did he prior to installation notify the plaintiff that he would not pay for same. Secretary of War Baker made no agreement with plaintiff to pay for the switchboard, never personally authorized such payment, never heard it suggested, and did not know until after the armistice that plaintiff contemplated submitting claim for the same.

XXI

At the close of the war the American Telephone & Telegraph Company contributed to the losses sustained by plaintiff on its telephone equipment installed for use in the Government service during the war, but soon thereafter discontinued, including, including the new switchboard in question. The American Telephone & Telegraph Company contributed $1,250,000 on December 31, 1919, to cover such losses, being set out in the minutes of its executive board meeting of December 17, 1919, and containing the following language:

"Whereas the Chesapeake & Potomac Telephone Company, one of said associated companies, whose plant is located largely within the District of Columbia, was compelled in order to meet the late war emergency to make large and extraordinary expenditures on account of plant

that would not have been otherwise necessary at this time or in the immediate future;

"And whereas, the necessity for such large and extraordinary expenditures arose out of the requirements of the telephone service of the entire Bell system, and not solely out of the requirements of the telephone service of the Chesapeake & Potomac Telephone Company;

"And whereas, upon the termination of such war emergency, no further necessity exists for much of the plant so acquired by the Chesapeake & Potomac Telephone Company, and it can not be presently utilized within its territory, so that the transaction involved a considerable loss to said telephone company;

"And whereas, equity requires that said loss, which was incurred in behalf of the entire Bell system, be not imposed wholly upon said Chesapeake & Potomac Telephone Company.

"Resolved, That this company participate to the extent of $1,250,000 in the loss so incurred * * *."

Such action was taken by said American Telephone & Telegraph Company while plaintiff's claim on account of said switchboard was pending before the Board of Contract Adjustment of the War Department.

XXII

The sum of $312,000 of said payments was so contributed to cover telephone equipment or plant which was under way at the time of the armistice, and which was soon thereafter abandoned. The remaining $938,000 was con- [fol. 18] tributed to cover the ultimate net loss on plant which had been put into service prior to the armistice, but which plaintiff had planned to retire at a later date, the gross book value of which amounted to $1,849,929.14.

XXIII

While the said $1,849,929.14 represented the gross book value of the latter class of telephone plant, the actual net losses thereon amounted to less than $900,000, so that the sum of $938,000 set apart to cover such losses was more than ample to cover the actual losses on that equipment, among which items was listed the War Department's

switchboard at $328,166.56, designated as "P. B. X., Case No. 20, War Department."

XXIV

The following revenue was received from the War Department during the period of service of the new switchboard, by the Bell system, of which the American Telephone & Telegraph Company was the parent concern:

The total long-distance telephone tolls for calls emanating from the War Department amounted to $482,124.00, and the incoming long-distance calls and tolls were about equal to the outgoing calls and tolls, making a total of incoming and outgoing tolls of approximately $946,248.00, the bulk of which represents the long-distance revenue received by the Bell system through the instrumentality of the new switchboard, aside from the leased line rentals of $141,812.53 paid to the American Telephone & Telegraph Company by the War Department. Plaintiff received about 30 per cent of the gross amount of outgoing long-distance tolls, which would be $144,637.20. The remainder of the $946,248.00 plus $141,812.53, to wit, $943,423.33, was received by the American Telephone & Telegraph Company and its other subsidiaries of the Bell system, and other lines.

XXV

The gross revenue, exclusive of long-distance tolls, received by plaintiff from the War Department for telephone service under the General Supply contracts for the fiscal year beginning July 1, 1916, and ending June 30, 1917, was $5,714.77; July 1, 1917-June 30, 1918, $85,809.41; and July 1, 1918-June 30, 1919, $338,824.60. In addition there was paid to plaintiff by the War Department the sum of $35,917.05, mentioned in Finding XVI, supra.

The gross revenue under the said contracts from the same source for the period the new switchboard was in service, June, 1918, to November, 1920, was $534,418.83.

XXVI

The Government was in control of the telephones of the United States for the period of one year ending July 31,

1919, under the contract between the Postmaster General and the American Telephone & Telegraph Company, and its subsidiaries, including the plaintiff herein. By this contract the Government was to and did reimburse these com- [fol. 19] panies for the use of their plants and equipment to an amount over and above all expenses assignable to operation and maintenance, licensing revenue, and also depreciation, at the average rate of return on the stock for the three preceding years.

XXVII

In the final settlement under this contract the Government paid the American Telephone & Telegraph Company and its subsidiaries $9,290,170.31. The portion thereof received by plaintiff in this settlement was $1,322,205.64, including 8% return on its stock for period of Government control, August 1, 1918, to July 31, 1919.

XXVIII

On May 19, 1919, plaintiff rendered the War Department a claim based upon the proportionate cost and estimated salvage of the thirty positions which had then been ordered removed. Thereafter, as fast as further positions were ordered removed and more accurate statements could be prepared, the claim was amended. The Secretary of War immediately referred the claim to the Board of Contract Adjustment, which held hearings thereon, on June 25, 1920, disallowed the claim in its entirety, and on July 20, 1920, denied an application for rehearing. An appeal was taken to the Secretary of War, who, on November 9, 1920, affirmed the decision of the board.

XXIX

The total cost to plaintiff of the new switchboard at 1723 F. St. N. W., and the associated equipment and of the installation thereof was $401,113.34. This amount does not include cost of additional telephones, nor cost of miles of wiring to afford operation.

The amount realized by the plaintiff as salvage for said switchboard and equipment, less the cost of removing same,

was $206,315.79. For depreciation upon such of said switchboard and equipment as was in use by the War Department during the period of Federal control, August 1, 1918, to July 31, 1919, the Government paid plaintiff the sum of $22,232.78, and as 8 per cent return on the investment in said switchboard and equipment for that period, $25,671.00, a total of $47,903.78. For the entire period that said switchboard and equipment, or a part thereof, were in use by the War Department, the War Department paid plaintiff for the use of switchboard and multiple jacks connected therewith the sum of $11,202.20.

After deducting from the said cost the aforesaid items of salvage, depreciation, 8 per cent return, and rental, which aggregate $265,421.77, the net loss amounts to $135,691.57.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and that its petition should be, and it is hereby, dismissed.

[fol. 20] Judgment is rendered against plaintiff for the cost of printing the record in this cause, the amount thereof to be ascertained by the clerk and collected by him.

Opinion

Graham, Judge, delivered the opinion of the court:

The facts of this case are fully set out in the findings and it is not necessary to recite them. Nor is it necessary to discuss the question of the plaintiff's right to recover under the telephone service contract hereafter mentioned, as the suit is not based upon that contract, and, if it were, it is too clear for discussion that there is no provision therein under which a recovery for the claim set up in this suit could be allowed.

The plaintiff is suing, as stated in its petition and brief, to recover under the act of Congress of March 2, 1919, 40 Stat. 1272, known as the Dent Act, for the difference between the cost of installation of a switchboard for use of the War Department and the value of what it realized from

the parts when the switchboard was removed. The reference to the act in the petition as the statute relied upon is in compliance with a rule of this court.

The switchboard was installed during the first half of 1918 and was completed on June 22, 1918. The claim here sued upon was presented to the Secretary of War, who referred it to the Board of Contract Adjustment, which rejected it, and on appeal to the Secretary of War the decision of the board was affirmed. Thereupon suit was brought in this court.

By section 4 of the act of June 17, 1910, 36 Stat. 468, 531, the Secretary of the Treasury was given sole authority to make contracts for supplies for the various departments of the Government, including telephone service. In the exercise of that power, on June 23, 1916, he entered into a contract with the plaintiff to provide telephone service for the various departments of the Government in the District of Columbia for the fiscal year ending June 30, 1917; and on May 18, 1917, a similar contract was entered into for the year ending June 30, 1918. During the period from August 1, 1918, to July 31, 1919, the Postmaster General was in control, under authority from the President, of telephone service. Under each of these contracts the plaintiff undertook to install and maintain such telephone equipment, at its own risk and expense, as would be required by the various departments of the Government in the District of Columbia, and to furnish service in connection therewith.

The original switchboard installed by plaintiff in June, 1908, was a three-position multiple private branch exchange No. 4 switchboard; on March 23, 1917, this was increased to five positions; in August, 1917, there was an increase to nine positions; on October 1, 1917, to twelve positions: and in November, 1917, came the first suggestion with regard to the switchboard out of which this controversy arose. These several increases were made by the plaintiff without claim upon the department for furnishing the facilities necessary to meet the increased business.

It is equally clear from the facts found that the Secretary of War made no agreement with the plaintiff to pay for the switchboard, never authorized such payment, never heard it suggested, and did not know that the plaintiff con- [fol. 21] templated submitting a claim for the same until

after the armistice. Mr. Scofield, who, if anyone under the Secretary of War, had authority to make such a contract, never stated to plaintiff's representative that the War Department would pay for the installation of or losses on the new switchboard, and the department never recognized the claim of an agreement with the plaintiff to pay for the switchboard other than by way of the usual rental provided for in the general supply contract.

It is necessary for recovery under the Dent Act that a party making a contract should have authority so to do, and in this case there is a complete absence of proof of authority. The purpose of the Dent Act was to give a remedy upon contracts irregularly made, not upon contracts without authority. Jacob Reed's Sons v. United States, 273 U. S. 200, 202; Baltimore & Ohio Railroad Co. v. United States, 261 U. S. 592, 596.

The findings show no express contract and no facts from which a contract could be implied. The contract required by the Dent Act must be a contract in fact or an agreement implied in fact, as distinguished from an agreement implied in law. Baltimore & Ohio R. R. Co. case, supra.

The petition should be dismissed, and it is so ordered.

Sinnott, Judge, and Green, Judge, concur.

DISSENTING OPINION

Chief Justice BOOTH dissenting:

This is a suit to recover the cost, less salvage value, of a central-office type of switchboard installed under contract to pay therefor, by the plaintiff in a building of the War Department. The cause of action arises under the Dent Act (40 Stat. 1272). The alleged contract is informal and one growing out of the acts of the parties. As far back at least as 1908 the plaintiff has been furnishing telephone service to the departments of the Government and the District government. The character of service furnished the War Department was and is what is technically termed "a private branch-exchange switchboard service." This service imposes the necessity of the telephone company installing a private branch-exchange switchboard in quarters furnished by the Department, through the mediumship of

which calls to the various rooms and branches are immediately available without the necessity of going through the main central-office switchboard. Concededly such a service conserves time and affords convenience. In 1908 the plaintiff installed in the War Department the usual, customary, and well-known #4 private branch-exchange switchboard. The board had a capacity of 280 lines, and when put in service 180 of the 280 were utilized.

In the annual legislative, executive, and judicial appropriation bill, approved June 17, 1910 (36 Stat. 468-531), the Congress provided for a general supply committee and centered the authority in the Secretary of the Treasury to contract for the furnishing of supplies for all the executive departments. Telephone service was expressly included in the act. Following the enactment of this legislation the plaintiff, so far as material here, entered into written contracts with the Secretary of the Treasury for the furnishing of telephone service to all the executive departments of the Government and the District government. These annual contracts were dated, respectively, June 23, 1916, May 18, 1917, and September 25, 1918, all known as [fol. 22] general supply contracts. The determinative provisions and terms thereof appear in Findings III and IV. It is to be first noted that under the rates fixed by the Public Utilities Commission the plaintiff could do no more than contract to furnish the service at the established and approved rates of the commission. The commission did recognize the possibility of the company being required to furnish a type of equipment at an extra cost of installation, and to meet such emergencies authorized the company to contract for and charge the expense incident thereto. The provisions with respect thereto are set forth at the close of Finding V. There was also in each contract an express provision that the company would furnish additional service and equipment at the rates stated in the same.

The plaintiff observed every obligation imposed under the general supply contracts; it performed its covenants under adverse conditions, and in the midst of increases in the service that taxed its physical resources and finally developed a situation which, I believe, rendered it impossible to proceed under the supply contracts, and the War Department was as fully aware of existing conditions as the plain-

tiff. The happening of events, following closely upon each other, beginning with the Government's Mexican-border troubles, the unrestricted submarine warfare of Germany, and culminating with our entrance into and prosecution of the World War, so signally expanded the necessities of the War Department for telephone service that after exhausting every possible effort to meet the situation the plaintiff was in the end forced to do the special, unusual, and decidedly expensive thing of installing a central-office type of switchboard to meet the emergency and furnish the indispensable service. The telephone requirements of the War Department grew with rapid extensions from a required service of 257 telephones in January, 1917, to more than 6,000 in 1918, and it was manifest to all concerned that an increase of from 8,000 to 10,000 was to be anticipated. The activities of the War Department itself expanded during this period to the occupancy of sixty-five different buildings in the District of Columbia alone, not including other outside activities with which the department was in almost constant communication. The plaintiff, to meet this unusual demand for service, provided thousands of miles of additional wiring, supplied innumerable telephones, and incurred the unusual expense of furnishing a special type of switchboard known as #604, all without additional expense to the department, the plaintiff accepting without complaint up to this point the munificent compensation of $24 per annum for the use of its switchboard.

The situation having thus become acute, both parties realizing that the limit of service under existing conditions had been attained, and the War Department being no longer able to furnish quarters for the installation of additional or the enlargement of existing switchboards, the department decided upon the erection of a separate building to accommodate the installation of a switchboard and afford the plaintiff sufficient space to install the same, together with necessary incidental equipment to furnish the required telephone service. In a conference with the authorized officials of the department, one of the conferees being a specially appointed and deputized officer in charge of supervision over the telephone service, the plaintiff presented its plans [fol. 23] for the installation in the new building of a central-office type of switchboard. The plaintiff furnished to the

Secretary of War, and by him transmitted to the proper officials, a complete set of blueprints and specifications for the erection of the new building, disclosing in detail the necessities for space and indicating clearly the type of switchboard it was going to install. This is not all; the plaintiff's superintendent told the chief clerk of the department precisely what was to be done, and that the company was to be paid the cost thereof. The record sustains this fact, not alone from the testimony of the superintendent but corroborated by the chief clerk himself. True, the chief clerk made no reply to the superintendent, but nowhere in the record does the chief clerk assert a disavowal of responsibility for payment or a lack of knowledge with respect to the fact that plaintiff was proceeding with the expectation of being reimbursed for this unusual expense, and this fact is found in the closing paragraph of Finding XIII.

Following the preliminary negotiations the War Department did erect, at a cost of at least $130,000, a new and separate building at 1723 F Street N. W. This building, completed in record time, was so designed as to accommodate a central-office type of switchboard and all the necessary equipment. Within the building the plaintiff most expeditiously installed a central-office type of switchboard at an admitted cost of $401,113.34, a telephone exchange sufficient in capacity to furnish telephone service to a city of 100,000 inhabitants, a switchboard that required almost double the number of operators to operate, and a board for which the plaintiff had absolutely no use except for this especial purpose. It possessed no value other than salvage to the plaintiff. After the war was over and the necessities of the department declined to normal and the property of the plaintiff had been returned to it, subsequent to the period of Federal control, the plaintiff sold this switchboard for a net sum of $206,315.79. For the rental of the switchboard and equipment during the period of Federal control, the plaintiff received from the Government $11,202.20, and there was paid the plaintiff a depreciation allowance upon the switchboard and equipment by the Government of $22,232.78; deducting the sum of these items from the cost of the board leaves the balance of $161,362.57, for which amount judgment is asked.

The Dent Act (40 Stat. 1272) was a congressional recognition of contracts which had "not been executed in the manner prescribed by law." In according vitality to informal agreements the Congress intended to and did expressly extend the remedy to agreements expressed or implied. The decision of the Supreme Court in the Baltimore and Ohio Railroad case, 261 U. S. 592, 596, in construing the statute held that a contract, express or implied, must not only be established but the authority to make the contract upon the part of the Government must likewise be proved. The plaintiff's case is dependent upon these two distinct issues. If we abstract from this record the written contracts, i. e., the general supply contracts, it is seemingly apparent that an implied contract to pay the amount claimed exists. Due to the situation confronting the parties at the time, the department resolved to erect a separate building and the plaintiff was compelled to supply an unusual and expensive switchboard of a special type. This [fol. 24] would of itself, in the absence of other facts, warrant an inference that the plaintiff was furnishing equipment under circumstances of expecting pay therefor, and the department accepted the same under the same impression, for it would be indeed unusual for a person or corporation, after having exhausted all its physical resources to perform a given service and expended a large sum for work, labor, and materials to that end, to voluntarily enter upon a distinct character of service involving a great expense without the thought of reimbursement, especially so when the prevailing condition is one of war emergency, and the source of remuneration for the additional outlay is subject to indefinite and permanent extinction. The defendant puts forth no argument in opposition to this contention of the plaintiff.

Among the various defenses interposed, two relied upon with much confidence are predicated upon an assertion that under the record the plaintiff was obligated to furnish the service under the supply contracts, and if not so it does not appear that any officer of the Government having authority to make contracts did make the contract relied upon. The scope of contractual obligations may be ascertained from what the contract itself indicates as the intention of the parties in making the agreement. In other words, taking

into consideration the subject matter of the contract, and the terms used therein, what did the parties contemplate as to the beginning of the service and the limits to which one or the other may go in exacting performance of the same? As much better expressed in the case of Canal Co. v. Hill, 15 Wall. 94, 99: "* * * we should look carefully to the substance of the original agreement * * * as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements." The general supply contracts covered a telephone service for all the executive departments of the Government and the District government. They were the formal, usual, and customary contracts executed under the general supply statute securing to the Government the customary telephone service. In each there was a provision anticipatory in character, i. e., a covenant which obligated the plaintiff to meet normal increases and a corresponding covenant to decrease the service and reduce the compensation to be paid if future conditions so warranted.

There is no provision in the contracts even remotely suggesting that the contracts were designed to cover the development of a condition due to a war, or that the parties thereto contemplated the extraordinary and pronounced expansion of the service which subsequently occurred. Surely a contention that the supply contracts exacted the furnishing of a switchboard of the size and cost furnished the War Department to each and all the executive departments mentioned in the supply contracts would be untenable. It is obvious that such a burden was never intended by the parties to be assumed without remuneration. The very insignificance of the compensation to be paid for a private branch-exchange switchboard, to wit, $24 per annum, clearly indicates what the parties contemplated. It is true one of the supply contracts was executed when war was flagrant and the service on the increase, but it is equally true that the plaintiff performed without extra expense, [fol. 25] except as the contract provided, what it agreed to do under these contracts until conditions rendered the impossibility of further performance. While the character of the service remained the same, and the subject matter of the contracts did not change, it has been held by the

courts that performance of additional service not within the contemplation of the parties when the contract was made, a service so vast in extent and so manifestly disproportionate as to characterize it as one distinct from the contract, may not be imposed upon a contractor without paying therefor. United States v. Stage Co., 199 U. S. 414; O'Brien v. Miller, 168 U. S. 287.

The determinative issue with respect to a contract to reimburse is seemingly confined more to the question of authority to make rather than the existence of an implied contract. Every responsible and authorized officer of the department was advised and fully cognizant of the emergency situation and the absolute inadequacy of the installed equipment to meet the situation. Cooperation between the plaintiff and the officers existed. The vast extent of the changes necessary was assented to. Those in authority authorized the new building and cannot escape express notice of the exact character of the switchboard to be erected therein. Mr. Scovell, in charge of the entire telephone service for the department under an appointment the legality of which is not questioned, concedes a contract to pay the cost of the board. The chief clerk, whose authority to contract is conceded, admits that the superintendent of the company said to him as follows:

"Do you remember anything being said to you by any officials of the telephone company about payment for the new switchboard? Do you have any specific recollection of anything being said to you?"

to which he replied:

"I have a recollection that Mr. Claggett spoke to me, as I say, after the building was completed, or when it was substantially completed. He did not put it in the form of a letter, just mentioned it. He said: 'You know, we will have to ask you to pay for this,' or something like that—'we will have to bill you for this,' or some remark of that kind, but nothing in the nature of a formal demand."

and further:

"What did you say in response?" "I do not remember that I said anything. I do not know what I said."

It is true the chief clerk further testified that he did not indicate to the superintendent that he intended to pay the bill, but what is of more significance he did not indicate to him that he did not intend to pay the bill. Silence, when one is obligated to speak, not infrequently carries with it a greater degree of responsibility than spoken words. Two pertinent inferences are deducible from this testimony. First, the chief clerk knew the plaintiff was not doing this extra work for nothing. Second, no protest was lodged against the claim and no indication of a lack of assent to it. It is no criticism of the chief clerk and no challenge of his good faith throughout the transaction to emphasize the fact that under the law, where one in authority stands by with knowledge of a claim for pay for services and permits the performance of said services without a protest, he may not claim all the benefits thereof and disavow the responsibility to pay. This, I think, is axiomatic, and applies with added [fol. 26] force when one party is indispenably in need of the service and the other party is insisting that no express contract exists extracting it. It has been long since adjudicated that a Government contract is subject to the same rules of construction as a contract between private individuals.

Keeping in mind that the case involves an implied and not an express contract, it is difficult to escape a conclusion that the plaintiff did all it was required to do under the circumstances to establish its right to reimbursement. The Dent Act, it seems to me, was intended to afford relief in this identical class of cases. Swift & Co. v. United States, 270 U. S. 124. The acute situation as to telephone service in the department is reflected in the appointment of Mr. Scovell and placing in his charge the telephone service. Scovell during his incumbency had purchased telephone supplies "without any written order," and the department paid them without question. He had also given orders for work and installations extra in character to the plaintiff company; that is, oral orders, and payment had been made without question. It is conceded that Scovell was there to get the best and most expeditious service possible and that the "Secretary of War supported him in that." Nowhere in the record is it disputed that Scovell had direct charge of the telephone service and that the plaintiff dealt directly with him as occasion demanded. Scovell, an expert in his

line, knew more about and came more directly in contact with the service than any or all the officers concerned. He and he alone was the actual participant put forward by the department to deal with the plaintiff. He reported directly to the Secretary of War, and so far as this record discloses this transaction is the single one where Scovell's authority to act has been questioned. The findings recite (Finding XII) that he had no contractual authority and then proceed to recite that he did without written orders from the Secretary of War or the chief clerk order this plaintiff to do extra work and make extra installations, for all of which the department authorized payments to be made.

It is not always difficult to spell out of a situation after the fact that no proclamation of express authority was ever issued to a certain official to act, when as a matter of fact during the confusion and pressure of an illimitable emergency, an emergency so great that the Secretary of War was under the tremendous burden of expending, as he says, "a million of dollars every hour of the day and night, and every day in the week, including Sunday," no one questioned the authority of the official, and what he did in the discharge of his duties was approved without question. Swift case, supra. Scovell had some definite place in the organization, and if he was charged with the duty of procuring the best telephone service "as quickly as possible" surely it is no violent presumption that along with his assignment went complete authority to accomplish what he was charged with doing.

The authority of the chief clerk to contract is conceded, as previously observed; no one challenges his right so to do, and while the findings are replete with positive statements of lack of authority upon the part of Scovell, it is one thing to find as an ultimate fact lack of authority, and quite another to deduce from words and conduct the relationship obtaining between the parties to a transaction. It is difficult to conceive a right to hold one out to the public with au- [fol. 27] thority to act, ratify a number of acts involving authority to thus act, and then after a transaction has passed to the point of execution and all the benefits of the same have been accepted and enjoyed, disavow responsibility to pay therefor. In the amendments made to the original findings nothing in the view of this opinion materially affects the status of the case. The amendment to Finding

XII serves only to emphasize what was previously found, and the amendment to Finding XIII clearly indicates that the representatives of the telephone company expected pay, and at least one of its officials was unwilling, until ordered by his superior officer, to proceed without an express contract to pay. Surrounding the whole case, conceding arguendo that the findings are in all respects accurate, there exists, it seems to me, a clear, irrefutable inference and understanding that what the plaintiff was called upon to do was most extraordinary, unusual, and not within the customary and established course of dealing between the parties during all previous years. The defendant was fully aware of this fact, and it is difficult to conclude that under all the circumstances of the case the defendant expected to receive the service rendered without paying therefor.

Finding XVI, if relied upon as a defense, is, it seems to me, available to sustain the plaintiff's contention. The item of cost paid for removal of the exchange from the War Department to the new and separate building was paid under a conceded liability for equipment not provided for in the supply contracts. It is the switchboard not provided for in the supply contracts that is involved in this case, and it is the cost of same for which recovery is claimed, under an implied contract to reimburse. As a matter of fact, the payment of cost of removal of lines, wires, and various incidental materials, including labor involved, seems to be remotely connected with an alleged contract to pay for the switchboard involved. Cost of removal and furnishing a central-office type of switchboard are two distinct items.

A defense made in defendant's brief, insisted upon in the argument and covered by Findings XXI, XXII, and XXIII, is predicated upon an alleged reimbursement of the plaintiff by the American Telephone and Telegraph Company of the loss sustained by the plaintiff in installing the switchboard in suit. The opinion of the court contains no comment respecting the insistence. It is difficult to perceive what place the facts have in the record. This is not a suit for damages. It is for the recovery of compensation under an implied contract for materials furnished, and in the absence of any discussion of the issue, in the opinion of the court, the defense was obviously regarded as untenable.

Strange as it may seem, the defendant requested Findings XXIV and XXV. In these findings facts are recited

disclosing a vast increase in revenue to the plaintiff company, while in the preceding findings the fact is found that notwithstanding these vast increases the plaintiff company in its anxiety to serve the Government during the war actually lost in furnishing extra equipment, etc., at least $1,250,000. The pertinency of these findings, as well as those with reference to the matter of Federal control, is to me obscure. It would be a most remarkable state of facts if at the end of the services rendered in this case the revenue therefrom should have remained at the same total sums as in the beginning. What all this has to do with the cost [fol. 28] of installing a central-office type of switchboard can assuredly have no greater significance than the basis for an inference that the plaintiff was alone concerned in installing this extra type switchboard for the increased profits which would accrue. Such an inference fails in view of Finding XXI.

This case being now before the court on the plaintiff's motion to amend the findings and for a new trial, I dissent from the judgment of the court in overruling the motion. I think the motion should be allowed, and that the findings should be amended in certain particulars as pointed out by the plaintiff and sustained by the record. The motion for a new trial should be allowed, and judgment awarded the plaintiff for the amount claimed in the petition.

Moss, Judge, concurring.

[fol. 29] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 10th day of June, A. D., 1929, judgment was ordered to be entered as follows:

Upon the amended special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and that its petition should be and it is hereby, dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record in this cause, the amount thereof to be ascertained by the Clerk and collected by him according to law, the amount of which is found to be $1,129.97.

[fol. 30] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,520. Court of Claims. Term No. 389. The Chesapeake & Potomac Telephone Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed September 10, 1929. File No. 34,520.

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 389.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Petitioner,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF IN BEHALF OF PETITIONER, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1929.

No. 389.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Petitioner,
vs.
THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Court of Claims (R. 29-31) has not yet been reported. The dissenting opinion of Chief Justice Booth, concurred in by Justice Moss, will be found on pages 31-41 of the Record.

II.

JURISDICTION.

This is on petition for certiorari to the Court of Claims under Section 3(b) of the Act of February 13,

1925, 43 Stat. L. 936, 939. The judgment was entered June 10, 1929. (R. 41.) The petition for certiorari was filed September 10, 1929. (R. 42.)

III.

STATEMENT OF THE CASE.

This case involves the claim of the petitioner, The Chesapeake and Potomac Telephone Company, against the United States, for the difference between the cost of a very large telephone switchboard furnished and installed for the War Department during the World War, and the amount realized from the parts when the switchboard was removed after the emergency need therefor had ceased. The claim was filed under the Act of Congress of March 2, 1919, (40 Stat. 1272), known as the Dent Act, after the preliminary proceedings required by that Act had been duly concluded. (R. 28, Finding XXVIII.)

From June, 1908, to February, 1917, a switchboard with a capacity of 280 lines had been sufficient to supply the telephone needs of the War Department in the District of Columbia. (R. 17, Finding VI.) Then, due in part to Mexican border troubles and Germany's declaration of its policy with respect to unrestricted submarine warfare, the telephone needs of the Department began to increase, and larger equipment was then installed and thereafter increased from time to time, by various expedients, which resulted in increased cost of operation to the Government and in a less speedy and less accurate service, until the limit to which such equipment could be expanded had been reached. (R. 17-18, Findings VII, VIII and IX.)

By November, 1917, seven months after war had been

declared by the United States, the officials of the Telephone Company foresaw and informed the officials of the War Department that the telephone requirements of the Department, due to war conditions, would exceed the maximum capacity of the type of switchboard then installed, and that it would be necessary to provide a switchboard equipment larger than any previously designed and used for even the largest private branch exchange then existing. (R. 18-19, Findings X and XI.)

No space in the War Department buildings was then available, and accordingly, the War Department thereupon erected a building, especially designed and constructed for the purpose of housing such larger switchboard equipment. This building was designed by an architect and built by a contractor, both employed by the Government. (R. 19, Finding XI.)

At that time there was in effect a General Supply Contract, made by the Secretary of the Treasury with the Telephone Company, under authority of the Act of June 17, 1910, (36 Stat. 468, 531), providing for the furnishing of telephone equipment and service to the various Government Departments and Bureaus in Washington, for the fiscal year ending June 30, 1918. This contract had been entered into on May 18, 1917, and was substantially similar to the General Supply Contract for telephone service for the previous year, which had been entered into on June 23, 1916. These contracts provided a rental of $24.00 per year for a private branch exchange switchboard, and a like rental was provided by the General Supply Contract for the fiscal year beginning July 1, 1918. (R. 13-16, Findings II, III and IV.)

The Telephone Company submitted plans to the Sec-

retary of War for the purpose of securing approval of the proposed switchboard and equipment and its layout in the proposed building with relation to the floor space before placing a final order for the construction thereof. These plans indicated the extensive character of the various parts of the equipment. The endorsements with which the plans were returned to the Telephone Company indicated approval thereof, and Arthur D. Scovell, Director of Telephones for the War Department, orally approved of the proposed switchboard and equipment. (R. 21-22, Finding XIII.)

Before beginning the installation of the new switchboard in the new building, the Telephone Company, through its proper official, informed John C. Scofield, Assistant to the Secretary of War and Chief Clerk of the War Department, and the said Arthur D. Scovell, Director of Telephones for the War Department, that the Telephone Company would expect the Government to pay the cost of the new switchboard less salvage. Mr. Scofield ranked next to the Secretary of War himself in the control of the telephone service of the Department, and had supervisory charge of the estimates and expenditures from the appropriation "Contingent expenses of the War Department." Mr. Scovell was in immediate charge of the telephone service of the War Department, which was under the general direction of Mr. Scofield. (R. 19-22, Finding XII and XIII.)

The new board was expeditiously and properly installed, in the building provided therefor by the War Department, and was accepted and used by the Department, beginning in June, 1918. The total cost to the Telephone Company of the switchboard and equipment and their installation was $401,113.34. The switchboard was of the type which is installed in a central-

office telephone exchange, and was of sufficient capacity to serve as a telephone exchange for a city of from 40,000 to 100,000 inhabitants. When fully completed, it had positions for 75 operators, and served 65 different buildings, in various localities in the District of Columbia, where the War Department's activities were housed. (R. 22-23, 28, Findings XIV and XXIX.) After the Armistice, the Department ordered portions of the board removed from time to time, and the last was removed at the end of 1920, and thereafter telephone service was provided for the War Department through the Navy Department switchboard. (R. 23, Finding XV.)

On May 19, 1919, the Telephone Company presented its claim to the War Department, based upon the proportionate cost and estimated salvage of the portion of the board which had then been ordered removed, and, as further positions were ordered removed and more accurate statements prepared, the claim was amended. The Secretary of War immediately referred the claim to the Board of Contract Adjustment, which, after hearings, disallowed the claim in its entirety on June 25, 1920, and on July 20, 1920, denied an application for a rehearing. An appeal was taken to the Secretary of War, who, on November 9, 1920, affirmed the decision of the Board. (R. 28, Finding XXVIII.)

Suit was then filed in the Court of Claims, which, by a court divided three to two, concluded that the Telephone Company was not entitled to recover and dismissed its petition. (R. 31, 41.)

In reaching this conclusion the Court, as appears from the majority opinion, (R. 29-31), held that Section 4 of the Act of June 17, 1910, gave the Secretary of the Treasury "sole authority" to make contracts

for supplies for the various departments of the Government, including telephone service, thus entirely ignoring the very large size and unusual character of the switchboard in question, the fact that the exigencies of the war required that it be secured as speedily as possible and without waiting to advertise, and that it was not, within the intent of the Act, an article "in common use by or suitable to the ordinary needs of two or more such departments or establishments."

The Court also apparently held that the supply contracts made by the Secretary of the Treasury under authority of this Act covered this switchboard, or, in other words, that the telephone company was obligated to furnish the War Department with a $400,000 specially designed switchboard for a rental of $24 a year, and then to remove it some two years later when the needs of the Department for telephone service had rapidly decreased.

The Court further held that the contract sued upon was made without authority, although it clearly appears from the findings that the telephone company, before installing the switchboard, gave notice personally to Mr. Scofield, who ranked next to the Secretary of War himself in the control of the telephone service of the Department, and also to the Director of Telephones for the Department, that the Government would be expected to pay the cost of the board less salvage, and although the Department built a building specially for the board, which it approved, accepted, and used, and although a claim for compensation was presented to the Secretary of War and by him referred to the Board of Contract Adjustment some eighteen months before the Department finally discontinued its use of the board.

Furthermore, in spite of its findings of fact as just summarized, the Court held that its findings showed no facts from which a contract was implied in fact, which is apparently based upon the erroneous view that an express promise to pay is essential to such a contract. The Court also in effect held that the Government could accept and retain all the benefits of this contract, and yet disavow all of its burdens, even though the War Department continued to use the switchboard in question after the claim for compensation therefor had come before the Secretary of War and been referred by him to the Board of Contract Adjustment, and though the Department did not finally discontinue the use of such board until some eighteen months thereafter.

A dissenting opinion (R. 31-41) was filed in the Court below by Chief Justice Booth and was concurred in by Justice Moss. Their view was that the switchboard was not contemplated or covered by the general supply contracts, that the contract sued upon was made by proper authority and was sufficiently established, and that the telephone company was entitled to recover the amount claimed in its amended petition.

IV.

SPECIFICATION OF ERRORS.

1. The Court of Claims erred in holding that, under the provisions of Section 4 of the Act of June 17, 1910, (36 Stat. 468, 531), the Secretary of the Treasury had sole authority to contract for so large and unusual a switchboard as is here involved, for the use of the War Department.

2. The Court of Claims erred in holding that the gen-

eral supply contract between the Secretary of the Treasury and the Telephone Company for the fiscal year ending June 30, 1918, and the general supply contract between the same parties for the following fiscal year covered the furnishing and installation of the switchboard in question and the compensation to be paid the Telephone Company therefor.

3. The Court of Claims erred in holding that the contract sued upon was made without authority on the part of the contracting official or officials of the War Department.

4. The Court of Claims erred in holding that the findings of the court showed no facts from which a contract could be implied in fact.

5. The Court of Claims erred in failing to hold that the findings of the court set forth facts from which a contract was implied in fact.

6. The Court of Claims erred in holding that the Government could accept, and, even after claim had been filed with the Secretary of War, retain the benefits of the contract, and yet disavow its burdens.

7. The Court of Claims erred in dismissing the claimant's petition on the findings of fact.

8. The Court of Claims erred in not entering a judgment for the claimant for the amount claimed in its amended petition, upon the facts as found by the court.

V.

SUMMARY OF ARGUMENT.

A. The switchboard here involved is not within the meaning or intent of Section 4 of the Act of June 17, 1910, giving the Secretary of the Treasury authority to advertise and contract for common or usual sup-

plies for the executive departments and other government establishments in Washington, because:

The Act, in terms, applies only "when the public exigencies do not require the immediate delivery of the article."

The Act relates only to articles "in common use by or suitable to the ordinary needs of two or more such departments or establishments."

The Act contemplates that the Secretary of the Treasury shall advertise and contract for such articles only.

The switchboard here involved was of a special and unusual size and character, was not in common use by or suitable to the ordinary needs of two or more such departments or establishments, and furthermore the urgent need therefor was such as to preclude the delay necessarily incident to advertising for bids.

B. Neither the furnishing and installation of the switchboard here involved nor the compensation to be paid the telephone company therefor are covered by the general supply contracts for telephone service, because:

Such switchboard, for the reasons above stated, was not within the meaning and intent of Section 4 of the Act of June 17, 1910, under the authority of which such contracts were made.

The rental of $24 per year provided by these contracts for a private branch exchange switchboard shows beyond any reasonable doubt that neither party thereto, at the time of execution, had in contemplation such a switchboard as is here involved or that the telephone company could be required to furnish and instal such a board, for some two and a half years' only of use, at a cost of over $400,000, for any such rental as $24 a year.

C. The special findings of fact, as found by the Court below, sufficiently establish the authority of the contracting officials of the War Department.

D. The special findings of fact, as found by the Court below, set forth facts from which a contract is implied in fact to compensate the telephone company. They show an offer by the telephone company, and approval, acceptance and use by the War Department.

E. When the War Department accepted, and, even after claim for compensation had been filed with the Secretary of War, continued to retain all of the benefits of the contract, it cannot disavow its burdens.

Conclusion. The decision of the Court of Claims was erroneous. The writ of certiorari should be granted, and the decision reviewed and reversed.

VI.

ARGUMENT.

Point A.

The switchboard here involved it not within the meaning or intent of Section 4 of the Act of June 17, 1910, giving the Secretary of the Treasury authority to advertise and contract for common or usual supplies for the executive departments and other government establishments in Washington.

This Act, the then annual legislative, executive and judicial appropriation bill, is found in 36 U. S. Stat. L. 468-531, and Section 4 thereof, (p. 531), the only portion of the Act material to this case, is as follows:

> "Sec. 4. That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other govern-

ment establishments in Washington, *when the public exigencies do not require the immediate delivery of the article,* shall be *advertised and contracted for* by the Secretary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be *a general supply committee* in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committee shall be to make, under the direction of the said Secretary, *an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties,* and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render whatever assistance they may require. The committee shall aid said Secretary in securing the proper fulfillment of the contracts for such supplies, for which purpose the said Secretary shall prescribe, and all departments comply with, rules providing for such examination and tests of the articles received as may be necessary for such purpose; in making additions to the said schedule; in opening and considering the bids, and shall perform such other similar duties as he may assign to them: *Provided, That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments;* but the said Secretary shall have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased. In all cases only one bond for the proper performance of each contract shall be required, notwithstanding that supplies for more than one department or

government establishment are included in such contract. Every purchase or drawing of such supplies from the contractor shall be immediately reported to said committee. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department: *And provided further,* That *telephone service,* electric light, and power service purchased or contracted for from companies or individuals *shall be so obtained by him.*" (Italics ours.)

This Section clearly contemplates the preparation from year to year, of a general supply schedule of required miscellaneous supplies, including telephone service and equipment, for the executive departments and other government establishments in Washington, but only of such articles as are "in common use by or suitable to the ordinary needs of two or more such departments or establishments," and even then only "when the public exigencies do not require the immediate delivery of the article."

The findings of the court below show, however, that the switchboard here involved was made necessary by the unprecedented needs of the War Department for telephone service, due to the World War and existing for a comparatively short time; that the board was specially designed and constructed, and was installed in a building specially planned and built to house it; that it was of the type ordinarily used for a central telephone exchange and of sufficient capacity to have

provided telephone service for a city of from 40,000 to 100,000 population; and furthermore that it was vital that it be provided at the earliest possible moment.

Can such a switchboard find any proper place in the general supply schedule contemplated by the Act now under discussion? And especially so when the public exigency required its installation and use at the earliest possible moment, and when such a board was not only not "in common use by or suitable to the ordinary needs of two or more" government departments or establishments, but was not even in use by any one such department or establishment up to that time, nor has it ever been "suitable to the *ordinary* needs" of any such department or establishment.

And yet the Court of Claims has erroneously construed this Federal Statute as being applicable to such an article, in utter disregard of the clearly expressed purpose, meaning and intent of the Act.

Point B.

Neither the furnishing and installation of the switchboard here involved nor the compensation to be paid the telephone company therefor are covered by the general supply contracts for telephone service then in force.

Since these contracts were made by the Secretary of the Treasury under the authority of Section 4 of the Act of June 17, 1910, which we have just discussed, and since, as there pointed out, the switchboard here involved is clearly not within the meaning or intent of that Section, it necessarily follows that it is not and cannot be covered by the contracts made thereunder.

Furthermore the one of these contracts which was in force when the board was installed was entered into the month following our declaration of war and before war conditions had given any real indication of the unprecedented though temporary need for telephone service which later developed in the War Department.

The provision in this contract of a rental of $24 per year as compensation for the installation and use of a private branch exchange switchboard establishes clearly that neither party to the contract, at the time it was made, contemplated, by this provision, any such switchboard as that here involved. Certainly the telephone company did not have such a board in contemplation, nor are we willing to believe that the Secretary of the Treasury did, in spite of the contention of the Government in defense of this claim and the majority opinion of the lower court.

Point C.

The special findings of fact, as found by the Court below, sufficiently establish the authority of the contracting officials of the War Department with whom petitioner dealt.

As before stated, prior to the installation of the switchboard here involved, the telephone company submitted plans to the Secretary of War, for the purpose of securing approval of the proposed switchboard and equipment and its layout in the proposed new building with relation to the floor space; and the endorsements with which these plans were returned to the company indicated approval thereof. (R. 22, Finding XIII.) The government erected this building, which was especially designed to house the switchboard and equip-

ment. (R. 19, Finding XI.) In addition, and before beginning the installation of the new switchboard, the telephone company, through its proper official, informed the Assistant to the Secretary of War and Chief Clerk of the War Department, and also the Director of Telephones for the War Department, that the telephone company would expect the government to pay the cost of the new switchboard less salvage. The Assistant to the Secretary of War and Chief Clerk of the War Department ranked next to the Secretary of War himself in the control of the telephone service for the Department, and the Director of Telephones had immediate charge of the telephone service of the Department, under the direction of the Chief Clerk. (R. 19-20, Finding XII.) It is true that the Court below found, (R. 25, Finding XX), that the Assistant to the Secretary of War and Chief Clerk of the War Department never represented to the telephone company's representative that the Department would pay for the installation or costs of or losses on the new switchboard; but the Court there also found that he did not, prior to the installation of the board, notify the company that he would not pay for the same; and there is nowhere in the findings any statement that, at any time after the company's notice to the Assistant to the Secretary of War and Chief Clerk of the War Department and to the Director of Telephones for the War Department that the Government would be expected to pay the cost of the board less salvage, and before the completion of the installation thereof, any official of the War Department informed the company that the Department would not or did not expect to pay for the board.

As to this phase of the findings the Chief Justice of

the Court below, in his dissenting opinion (R. 37, 38) said:

> "Every responsible and authorized officer of the department was advised and fully cognizant of the emergency situation and the absolute inadequacy of the installed equipment to meet the situation. Cooperation between the plaintiff and the officers existed. The vast extent of the changes necessary was assented to. Those in authority authorized the new building and cannot escape express notice of the exact character of the switchboard to be erected therein. Mr. Scovell, in charge of the entire telephone service for the department under an appointment the legality of which is not questioned, concedes a contract to pay the cost of the board."
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> * * *
>
> "Two pertinent inferences are deducible from this testimony. First, the chief clerk knew the plaintiff was not doing this extra work for nothing. Second, no protest was lodged against the claim and no indication of a lack of assent to it. It is no criticism of the chief clerk and no challenge of his good faith throughout the transaction to emphasize the fact that under the law, where one in authority stands by with knowledge of a claim for pay for services and permits the performance of said services without a protest, he may not claim all the benefits thereof and disavow the responsibility to pay. This, I think, is axiomatic, and applies with added force when one party is indispensably in need of the service and the other party is insisting that no express contract exists extracting [exacting] it. It has been long since adjudicated that a Government contract is subject to the same rules of construction as a contract between private individuals."

As to the contractual authority of the Director of Telephones for the War Department, while it is true

the Court below found that he "had no power to bind the Government in the matter of contract and was not in any sense a contracting officer", (R. 20, Finding XII), yet it also found, in the same finding, that he received his appointment from the Secretary of War, had immediate charge of the telephone service and traffic of the Department; that he was there to get the best service as quickly as possible, and the Secretary of War supported him in that; and that there were items of work or installations which were ordered for the telephone service of the Department by him, without any written order given at the time, but payments for which were subsequently made.

As to this official, the Director of Telephones for the War Department, the Chief Justice of the Court below, in his dissenting opinion (R. 39) said:

> "He (Scovell) and he alone was the actual participant put forward by the department to deal with the plaintiff. He reported directly to the Secretary of War, and so far as this record discloses this transaction is the single one where Scovell's authority to act has been questioned. The findings recite (Finding XII) that he had no contractual authority and then proceed to recite that he did without written orders from the Secretary of War or the chief clerk order this plaintiff to do extra work and make extra installations, for all of which the department authorized payments to be made."
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> • • •
>
> "It is difficult to conceive a right to hold one out to the public with authority to act, ratify a number of acts involving authority to thus act, and then after a transaction has passed to the point of execution and all the benefits of the same have been accepted and enjoyed, disavow responsibility to pay therefor."

Since, as hereinbefore discussed, the switchboard here involved did not fall within the provisions of Section 4 of the Act of June 17, 1910, nor of contracts made by the authority of that Act, to hold, as did the majority opinion of the Court below, that the contract sued upon was made without authority, and that, "in this case there is a complete absence of proof of authority," is equivalent to holding that there was no one in the Department of War except the Secretary of War himself who had authority to contract for a thing then absolutely indispensable to the efficient conduct of the business of the Department, at a time of such an emergency and crisis and when the Secretary of War was laboring under the tremendous burdens of his office.

Furthermore this holding entirely ignores the fact that the telephone company submitted plans to the Secretary of War for the purpose of securing approval of the proposed switchboard and equipment and its layout in the proposed building with relation to the floor space, before placing a final order for the construction thereof (R. 22, Finding XIII), and also the fact that the claim of the telephone company for compensation in connection with this board was rendered the War Department May 19, 1919, and referred by the Secretary of War to the Board of Contract Adjustment, so that it thus clearly appears in the findings that the War Department continued to use the board for more than a year and a half after the company's claim for compensation came before the Secretary of War for action (R. 23, 28, Findings XV and XXVIII). Even therefore if there were lack of full authority on the part of the Assistant to the Secretary of War and Chief Clerk of the War Department and also of the Director of Telephones for the War Department to bind the Govern-

ment contractually in this matter at the outset, which, however, we do not admit, still the fact that the War Department continued to retain and enjoy the benefits of the contract after notice to the Secretary of War himself of the claim of the company for compensation, amounts to a ratification of the contract by the Secretary of War, as to whose authority there can be no reasonable question.

In support of its holding as to lack of authority, the Court below, in its opinion (R. 31), cites two decisions of this Court, *Jacob Reed's Sons v. United States*, 273 U. S., 200, 202, and *Baltimore & Ohio Railroad Co. v. United States*, 261 U. S., 592, 596. As stated by the Court below, these cases both hold that it was not the purpose of the Dent Act to give a remedy upon contracts made without authority; but neither of these cases is applicable to the present case. As this Court said of the contract claimed upon in the *Reed* case (p. 202), "it is doubtful whether even express authorization could, under the then existing statutes, have conferred upon any one the power to make the contract which the plaintiff has attempted to prove," while, in the *Baltimore & Ohio* case, which involved a claim for the construction of certain barracks, the findings established, not only that no order by anyone having authority had been given, but that there had been no order or request whatever for the construction of the barracks and that the subject of compensation was never mentioned until after the barracks were completed. A case much more in point, which is cited in the dissenting opinion below, though not in that of the Court, is that of *Swift & Co. v. United States*, 270 U. S., 124, in which Mr. Chief Justice Taft delivered the opinion of this Court. The present case

is a stronger one for the claimant than was the *Swift* case.

Point D.

The special findings of fact, as found by the Court below, set forth facts from which a contract is implied in fact to compensate the telephone company.

As heretofore discussed, the switchboard here involved, at the time of the negotiations therefor with the officials of the War Department, was not covered by the existing supply contract or any other contract then in force.

The findings of the Court below show definitely that, before the installation of the switchboard, notice was given by the proper official of the telephone company to the responsible officials of the War Department, as just discussed under Point C, that the government would be expected to pay the cost of the switchboard less salvage. While the officials of the War Department did not make any express promise, either oral or written, to make such payment, they did clearly evidence their acceptance of this proposition or offer of the telephone company by approving the plans submitted by the telephone company, showing the character of the proposed equipment and its layout in the building which the government undertook to construct especially to house it, and which it did so construct, by the approval and acceptance of the switchboard as thereafter installed, and by its use for some two years and a half, and for over a year and a half after the claim of the telephone company for compensation therefor had been filed with the Secretary of War and by him referred to the Board of Contract Adjustment.

This, simply stated, constituted an offer by the tele-

phone company to furnish certain equipment upon certain terms, and an acceptance and use of that equipment by the War Department, acting through its responsible officials. From this a contract to pay is implied in fact, and so much the more clearly and strongly so where the offer was not merely accepted, but where all of the benefits of the contract were accepted and enjoyed by the Department.

The only possible basis, it seems to us, upon which the Court below, in the majority opinion, could have reached the conclusion that there were no facts found from which a contract could be implied in fact, is due to the finding that there was no express promise on the part of the War Department officials to compensate the telephone company for the switchboard. Such a holding is absolutely contrary to the fundamental and established principles of the law of implied contracts, which is too well settled, in this regard, to require the citation of authorities.

But even if the facts in this case had been less conclusive in showing the actual contract, nevertheless under the liberal construction which is given pleadings in the Court of Claims, the telephone company would still be entitled to recover, on a *quantum meruit*, reasonable compensation, measured at least by the cost of this specially constructed switchboard, less salvage, or by some larger measure. *Clark v. United States*, 95 U. S., 539.

Point E.

When the War Department accepted, and even after claim for compensation had been filed with the Secretary of War, continued to retain all of the benefits of the contract, it cannot disavow its burdens.

A switchboard of so large a size and unusual character as that here involved, installed in a building especially designed and constructed to house it, and supplying the pressing needs of a great department of this government in the time of such an emergency, is entirely different from some minor article which might have been ordered, without authority, by some minor official, and used, in a way, for the benefit of the government, but without the knowledge, assent or approval of any responsible official.

All of the responsible officials of the War Department knew of the installation and use of this switchboard, and must have known that it was not in anywise within the contemplation or scope of the general supply contract then in force, and yet the switchboard was approved, accepted and used so long as the war emergency made it necessary or desirable for the service of the Department.

In the face of these facts, however, the Court below, by its majority opinion, has held that the Government was entitled to accept all of the benefits of the contract, and then disavow the burdens, as though the law of contracts were, in this case, inapplicable to the United States. Such, however, is not the case, as the Court of Claims itself has previously recognized. Thus, in the case of *Ford vs. United States,* 17 Court of Claims, 60, 75 to 76, the Court said:

> "In applying the law of agency to the transactions of the government, it has not been the purpose of the Supreme Court, nor of this, to shackle or curtail the lawful and reasonable powers of the executive. Both courts have sought with great unanimity of decision to uphold the necessary discretion of the heads of the executive departments and other responsible officers of the government, but at the same time so to apply the law that subordinate and irresponsible agents should not bring upon the government an unauthorized indebtedness through the medium of implied contracts. In this application of the law of agency to the affairs of the government, the courts have also recognized the principle of ratification, and have held that ratification by the head of an executive department, or other responsible officer, could render a contract effective and valid which otherwise would be unauthorized and inoperative."

With the facts which were before the responsible officials of the War Department, it seems utterly unreasonable to us, and to show little regard for the intelligence we can properly conclude they possessed, to assume that they expected to receive the benefits of this switchboard without being required to pay the cost thereof less salvage, which they had been told by the telephone company would be expected.

As was said by the Chief Justice below in his dissenting opinion (R. 40):

> "Surrounding the whole case, conceding arguendo that the findings are in all respects accurate, there exists, it seems to me, a clear, irrefutable inference and understanding that what the plaintiff was called upon to do was most extraordinary, unusual, and not within the customary and

established course of dealing between the parties during all previous years. The defendant was fully aware of this fact, and it is difficult to conclude that under all the circumstances of the case the defendant expected to receive the service rendered without paying therefor."

In view of such a situation, it is the more unconscionable that the government should be allowed to retain the benefits of this contract and escape the obligation to make compensation therefor.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the errors committed by the Court of Claims, including, among others, that of erroneously construing a Federal statute, to-wit the Act of June 17, 1910, *supra*, may be corrected; and that, to such an end, a writ of certiorari should be granted, and that this Court should review the decision of the Court of Claims, and finally reverse the same.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 389.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,
Petitioner,
vs.
THE UNITED STATES.

BRIEF OF PETITIONER ON THE MERITS, SUPPLEMENTAL TO ITS BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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The petitioner's brief in support of the petition for a writ of certiorari to the Court of Claims covers the case on the merits to such an extent that a new and complete brief on the merits would involve much needless repetition and serve no useful purpose.

We desire, however, to amplify a few of the matters discussed in our earlier brief.

THE SIZE AND CHARACTER OF THE SWITCHBOARD.

For a clear understanding of the case, an appreciation of the size and character of the switchboard which forms the basis of the petitioner's claim is essential.

From June, 1908, until February, 1917, a three-position private branch exchange No. 4 switchboard contained in one room and with a capacity of only 280 lines, was more than sufficient to supply all of the telephone requirements of the War Department in the District of Columbia. During this entire period, the actual number of lines used by the Department increased from 180 to 257. (R. 17, Finding VI.)

Following the Mexican border troubles and the announcement by the German Government on January 31, 1917, of its policy with respect to unrestricted submarine warfare and the necessary pre-war activities of our Goverment, the telephone requirements of the War Department increased, and on March 23, 1917, a larger private branch exchange No. 4 switchboard, of five instead of three positions, was installed. (R. 17, Finding VII.) In August, 1917, four more positions were added. (R. 17, Finding VIII.)

As the telephone requirements of the War Department further increased and exceeded the capacity of the No. 4 type of private branch exchange switchboard, a different type, known as the No. 604 type of private branch exchange equipment, was installed on October 1, 1917, this time in two rooms instead of one, of the State, War and Navy Building. This Board had twelve operators positions and equipment for 1,000 lines. It was "the largest and most modern type of private branch exchange equipment then on the market." (R. 18, Finding IX.)

In the following months, additions were made to this board, and then, by various expedients, its capacity was further increased to 42 operators positions with equipment for 4,200 lines, the practical limit to which the equipment could be expanded, and even this required that many of the calls be handled by two operators instead of one and resulted in less speedy and less accurate service. (R. 18, Finding IX.)

It then became necessary, in order to meet the still increasing telephone requirements of the War Department, to change from the use of a private branch exchange type of switchboard to the type known as the central office type, which is the type used in the largest central telephone exchanges in the large cities. (R. 23, Finding XIV.)

The switchboard involved in this suit was of that type.

To house it required, not one or two rooms as sufficed for the previous boards, but an entire building, specially designed and constructed for that purpose, at a cost of $138,000.00. (R. 19, Finding XI.)

When first put in service, on June 22, 1918, this switchboard had 45 operators positions, with about 5,000 lines, and by the time of the Armistice this had been increased to 75 operators positions, with a corresponding increase in equipment. It had a much larger capacity than an ordinary private branch exchange switchboard and served 65 different buildings, located in various localities in the District of Columbia, where the War Department was housed. In addition it was connected by direct tie lines with the switchboards of nearly all the other Government Departments, and also directly with points outside Washington, some as far away as Ohio, thus putting the War

Department in direct communication with all these points without going through the central telephone exchange. It had a complete power plant of its own and was of sufficient capacity to serve as a telephone exchange for a city of 100,000 inhabitants. (R. 23, Finding XIV.) It cost the petitioner over $400,000.00, and this amount did not include the cost of all the additional telephones nor of the miles of wire to afford operation. (R. 28, Finding XXIX.)

For this switchboard, the Government contends that petitioner is entitled to compensation by way of rental at the rate of $24.00 per year, under the terms of the General Supply Contract in force at the time of its installation, and to no other compensation whatever except by way of the increases in annual rental charges at so much for each multiple jack in a switchboard, as provided in subsequent General Supply Contracts.

Whether the General Supply Contracts can have application to this switchboard must be determined by a consideration: first, of the provisions of Section 4 of the Act of June 17, 1910 (36 Stat. 468, 531), under authority of which the General Supply contracts were made, and then of the character and provisions of the contracts themselves.

SECTION 4 OF THE ACT OF JUNE 17, 1910.

This section is set forth in full and its meaning and intent discussed under Point A on pages 10 to 13 of our brief in support of the petition for certiorari.

In response to what we there said, the Government, in its brief in opposition to the petition for certiorari (pp. 10-11), urges that the switchboard in question forms a part of the telephone "service" for which, un-

der the section in question, the Secretary of the Treasury was given authority to contract, and that the limitations in this section as to the purchase of "articles" are not applicable.

It is true that the latter part of this section, after defining the manner in which the Secretary of the Treasury should advertise and contract for fuel, ice, stationery and other miscellaneous supplies in common use by or suitable to the ordinary needs of two or more departments or establishments of the Government, contains the following: "And provided further, that telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him." From this, the Government argues that "the Secretary of the Treasury had sole authority to contract for such telephone service as was required by the various executive departments in Washington, including the War Department."

This contention, we respectfully submit, entirely ignores the setting in which this proviso was placed by Congress. The section in question, as clearly appears from its terms, was intended to standardize the purchase of those supplies in common use by or suitable to the ordinary needs of two or more departments or establishments of the Government in Washington; and, even in the case of such supplies, an exception to the requirement that they be advertised and contracted for by the Secretary of the Treasury was made in those cases where the public exigencies required the immediate delivery of the article. In other words, this section was never intended to apply to the purchase of any article of unusual character which might be needed by only a single department or establishment of the

Government, as to which there was no occasion for making general provisions as to its purchase, nor to any article the public need for which was so urgent that it would have been detrimental to the Government to have the delay of advertising for bids.

It can hardly be supposed that Congress placed in this section the proviso as to contracts for telephone service for the departments and establishments of the Government in the District of Columbia without the thought that there was a definite connection between such contracts, and contracts for supplies, such as fuel, ice, stationery and other miscellaneous supplies.

It is true that the contract for telephone service, as also contracts for electric light and power service, provide primarily for "service" rather than "articles"; but the proviso above quoted expressly says that such service "shall be so obtained" by the Secretary of the Treasury, that is, obtained by him in the same manner that he is authorized and required to obtain supplies in common use in two or more departments and establishments of the Government.

To say, therefore, that this section of the Act contemplated that the Secretary of the Treasury, under a general supply contract for telephone service for all of the departments and establishments of the Government in the District of Columbia, not only had the authority, but the sole authority, to contract for and require the furnishing by petitioner as speedily as might be possible, of the $400,000.00 switchboard at a rental of $24.00 per year, is to take the bare letter of the section and to ignore utterly and absolutely the fair and reasonable meaning and intent thereof.

It would be just as reasonable to say that, under the general supply contract of the electric power company

in the District of Columbia to furnish electric light and power to the various departments and establishments of the Government, the Department of Agriculture, for example, might require the furnishing of sufficient electric power to operate a huge plant for the fixation of atmospheric nitrogen, and one requiring such a large supply of electric power that the power company would be compelled to construct an additional power plant to care for it.

Even though the furnishing of such electric power might be said to be within the bare letter of the proviso of the section in question, it certainly could not be said fairly to have been contemplated by Congress nor to have been contemplated by the parties to the general supply contract for electric light and power.

The section in question is one which, just as much as a contract or a will, should be taken by the four corners and read as an entirety, and not by piecemeal; and, when so read, it is fully apparent that the vesting of authority in the Secretary of the Treasury to make general supply contracts, whether for articles or for service, was intended to relieve the various departments and establishments of the Government from the burden of, and to bring about standardization, uniformity and economy in, the purchase of supplies and service commonly and ordinarily needed for two or more departments or establishments.

This question, as to the proper construction to be given to the proviso of section 4 relating to telephone service, electric light and power service, was under consideration by the Attorney General, and, in his opinion of July 25, 1910, Vol. XXVIII, Opinions of Attorneys General, pages 380, 383 he said, in his discussion of this proviso:

"Second. What is the meaning of the final proviso which relates to telephone, electric light, and power service?

"The last word 'him' necessarily refers to the Secretary of the Treasury. He is the only single individual mentioned in the entire section, except where it is declared that the supply committee shall be composed of an officer from each department 'designated by the head thereof'; and it is apparent that 'him' can have no reference to the head of a department as such. The proviso, therefore, is that the Secretary of the Treasury shall 'so' obtain telephone and electric light and power service purchased or contracted for from companies or individuals; and the word 'so' can refer to nothing else than the method of contracting for other supplies, which is set forth in the preceding parts of the section; and when such services are contracted for they must be ordered as other supplies.

"The purpose of this provision was to concentrate in the hands of one individual the power to contract for the services mentioned for all of the departments and establishments, so that uniformity and the most advantageous rates could be secured."

THE GENERAL SUPPLY CONTRACTS.

The scope of the general supply contracts is discussed under point B in our previous brief, pages 13 and 14.

For the reasons there stated, and because, as just above discussed, the switchboard in question was not within the fair meaning or intent of section 4 of the Act of June 17, 1910, it cannot be within the meaning or intent of the general supply contracts, which were made under the authority of that section and were limited to the extent of the authority there defined.

We may observe further, however, that the general supply contract for the year ending June 30, 1918, the one which was in force when this switchboard was ordered, and was constructed, installed, and its use begun by the War Department, provided a rental of $24.00 per annum each for "Common battery private branch exchange switchboards, including one operator's set of telephones for each operator's position."

While the General Supply Contracts for the two following years provided additional rental or revenue by way of a charge based on the number of multiple jacks in each private branch exchange switchboard, this fact can have no bearing on the question whether the switchboard here involved fell within the General Supply Contract in force when it was ordered, and was constructed, installed, and put in use. If the switchboard was not within the contract then in force, but was contracted for independently, it could not be brought within the intent or scope of subsequent General Supply Contracts merely through an increase in the rental or charge provided for private branch exchange switchboards. Nor is this affected by the following provision found in the General Supply Contract for the year ending June 30, 1919:

> "The Secretary of the Treasury, by accepting rates and terms herein stated on behalf of the subscriber, agrees that *the equipment now in service* is covered by this contract." (Italics ours) (R. 16, End of Finding IV.)

Of course the words, "the equipment now in service," refer, and can refer, only to the equipment in service under the preceding General Supply Contract.

In addition to the foregoing reasons which we have

given in support of our contention that the switchboard in question is not within the meaning or intent of the General Supply Contract for the year ending June 30, 1918, during which year the switchboard was installed and put in use, it should further be observed that, on May 18, 1917, when this contract was entered into (R. 13), neither of the parties to the contract can fairly be said to have contemplated the necessity for a switchboard of any such magnitude. The Government urges that, as the telephone requirements of the War Department began to increase in February, 1917, and as the United States entered the World War in April of that year, both parties did or should have had such needs in mind; but to say this, ignores the plain facts of the situation, as disclosed by the record, for a switchboard of five positions was sufficient, until August, 1917, between three and four months after the execution of this contract, to take care of all the telephone requirements of the War Department. We are unable to see why the fact that the three-position private branch exchange number 4 switchboard, which had been sufficient for the War Department from 1908, until February, 1917, had been increased to a five-position switchboard at the time the General Supply Contract was executed in May, 1917, should have led either party to the contract to suppose that within less than a year and a half, a seventy-five position board would be required.

The situation as to the telephone service of the War Department was one for which no real or comparable precedent existed, and the fact that the three-position board which had served for some nine years had been increased sixty per cent. at the time the contract was signed would hardly lead one to suppose that an in-

crease of twenty-five hundred per cent. would become necessary during the course of the following eighteen months.

As was said by the Chief Justice of the Court below, in his dissenting opinion (R. 36-37):

> "There is no provision in the contracts even remotely suggesting that the contracts were designed to cover the development of a condition due to a war, or that the parties thereto contemplated the extraordinary and pronounced expansion of the service which subsequently occurred. Surely a contention that the supply contracts exacted the furnishing of a switchboard of the size and cost furnished the War Department to each and all the executive departments mentioned in the supply contracts would be untenable. It is obvious that such a burden was never intended by the parties to be assumed without remuneration. The very insignificance of the compensation to be paid for a private branch-exchange switchboard, to wit, $24 per annum, clearly indicates what the parties contemplated. It is true one of the supply contracts was executed when war was flagrant and the service on the increase, but it is equally true that the plaintiff performed without extra expense, except as the contract provided, what it agreed to do under these contracts until conditions rendered the impossibility of further performance. While the character of the service remained the same, and the subject-matter of the contracts did not change, it has been held by the courts that performance of additional service not within the contemplation of the parties when the contract was made, a service so vast in extent and so manifestly disproportionate as to characterize it as one distinct from the contract, may not be imposed upon a contractor without paying therefor. United

States v. Stage Co., 199 U. S. 414; O'Brien v. Miller, 168 U. S. 287."

PRIVATE BRANCH EXCHANGE AND CENTRAL OFFICE SWITCHBOARDS.

The General Supply Contracts now under consideration provide the rental which the Government was to pay for "Common battery private branch exchange switchboards." It clearly appears from the findings that the switchboard here sued upon was not of the private branch exchange type, but was of the type installed in a central-office exchange, that is, the central office type (R. Finding XIV, pp. 22-23).

It is true that the use to which this specially constructed central office type of switchboard was put was that of serving as a private branch exchange for the War Department; and one of the contentions of the Government is that, because it was put to a private branch exchange use, it was therefore a private branch exchange switch-board within the meaning of the General Supply Contract, although in fact, it was not a private branch exchange type, but a central-office type.

It does not appear that any central-office type of switchboard had ever been installed and used as a private branch exchange prior to the installation of the switchboard here in question; and how, therefore, it can be fairly argued that, by the use to which this switchboard was put, in order to meet the great and unusual needs of the War Department, it suddenly became a private branch exchange switchboard within the fair meaning and intent of the General Supply Contract, we are unable to see.

Under Points C, D and E of our former brief (pages 14 to 24), we discussed the sufficiency of the authority

of the contracting officials of the War Department, the facts from which a contract is implied in fact to compensate petitioner, and the proposition that, when the War Department accepted, and even after claim for compensation had been filed with the Secretary of War, continued to retain all the benefits of the contract, it cannot disavow its burdens. It seems to us unnecessary to add to our discussion of these matters.

One point, therefore, remains for discussion.

THE AMOUNT TO WHICH PETITIONER IS ENTITLED.

The Government brief in opposition to the petition for certiorari (page 9) refers to the great increase in the revenues received by petitioner. While this increase occurred, it must be remembered that the figures give gross revenue and do not take account of the tremendous expenditures made necessary by the great increase in the service required and the handling thereof.

Furthermore, the revenue received by petitioner is entirely immaterial and irrelevant to the claim here involved, as is also the contribution made to petitioner by the American Telephone and Telegraph Company (R. 25-27, Findings XXI, XXII, XXIII). It appears, from Finding XXI, that this contribution was made while petitioner's claim for the switchboard was pending before the Board of Contract Adjustment of the War Department, and furthermore, no contribution from the American Telephone and Telegraph Company to its subsidiary, the petitioner, could change the status of petitioner's rights against the Government.

We respectfully submit that Findings XVIII, XXI,

XXII, XXIII, XXIV and XXV can have no real bearing upon the merits of this case.

Finding XXIX (R. 28-29) contains the figures from which the amount to which petitioner is entitled is to be ascertained.

The total cost to petitioner of the switchboard and associated equipment and of the installation thereof was $401,113.34, not including cost of additional telephones, nor cost of miles of wiring to afford operation.

The net amount realized by petitioner from the salvaging of the switchboard and equipment was $206,-315.75. This is a proper deduction from the above item of cost.

For depreciation upon such of said switchboard and equipment as was in use by the War Department during the period of Federal control, August 1, 1918, to July 31, 1919, the Government paid petitioner the sum of $22,232.78, and as eight per cent return on the investment in said switchboard and equipment for that period, $25,671.00. The item of depreciation, $22,-232.78, is also a proper deduction from the above item of cost, in view of the subsequent salvaging of the board and equipment; but we respectfully submit that the item of return on the investment, $25,671.00, is not a proper deduction.

One other deduction, however, is proper, namely, the payments made by the War Department to the petitioner for the use of the switchboard and multiple jacks which amounted, in the aggregate, to $11,202.20.

The three amounts, which we have stated to be proper deductions aggregate the sum of $239,750.77, and deducting this amount from the item of cost, $401,-113.34, leaves a balance of $161,362.57, which petitioner is entitled to recover.

CONCLUSION.

For the reason stated in our earlier brief and in this one, we respectfully submit that the switchboard here in question was not within the meaning or intent of section 4 of the Act of June 17, 1910, nor of the General Supply Contracts made under the authority of that section; that the contracting officials of the War Department with whom petitioner dealt had sufficient authority to make the contract sued upon, that before the installation of the switchboard such officials had full notice from petitioner that, if the board were installed, the Government would be expected to pay the cost thereof less salvage, that the board was duly approved, constructed, installed, and put in use by the War Department, that the contract was duly ratified by the Secretary of War himself, and that the Government continued to enjoy all of the benefits of the contract till the board was no longer needed for the service of the War Department; and that, from these facts arises a contract, implied in fact, to compensate the petitioner as claimed.

We, therefore, respectfully submit that the judgment of the lower court is erroneous and should be reversed, and that the lower court should be directed to enter judgment in behalf of the petitioner for the sum of $161,362.57.

Respectfully submitted,

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No. 389

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority and dissenting opinions in the Court of Claims have not yet been reported. The majority opinion will be found at pp. 29–31 of the Record; the minority opinion at pp. 31–41.

JURISDICTION

The Court of Claims entered judgment in this case on June 10, 1929. (R. 41.) The petition for certiorari was filed September 10, 1929. (R. 42.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner entered into a contract, known as the General Supply Committee contract, with the Secretary of the Treasury, who was exclusively authorized by law to make such contracts (Act of June 17, 1910, c. 297, Sec. 4, 36 Stat. 468, 531), for the furnishing of telephone service to the various Executive Departments in the District of Columbia, including the War Department, during the fiscal year ending June 30, 1918. This contract, like preceding and subsequent similar contracts entered into between the Telephone Company and the Secretary of the Treasury, provided for only a nominal annual rental for the necessary private branch exchange switchboards, the principal revenue being derived from mileage charges upon station lines, charges for telephone stations, and local messages.

The question presented is whether the petitioner is entitled under the Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272) to recover, as upon a contract implied in fact, compensation, not provided for in the General Supply Committee contract, covering the difference between the cost and salvage value of a large and costly private branch exchange switchboard which was installed in the War Department on June 22, 1918, to meet the telephone requirements of that Department growing out of the World War and which was gradually dismantled after the Armistice.

STATUTES

Section 4 of the Act of June 17, 1910, c. 297, 36 Stat. 468, 531 (U. S. C. Title 41, Sec. 7), providing inter alia, that telephone service for the various Executive Departments in the District of Columbia shall be contracted for by the Secretary of the Treasury annually, instead of by the several departments, is quoted in full on pages 10–12 of petitioner's brief and need not be here repeated.

The Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272), under which this suit was brought, provides in Section 1:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation * * * for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not

been executed in the manner prescribed by law: * * *.

Section 2 of the Act, the only other material section, gives the Court of Claims jurisdiction where the claimant is dissatisfied with the Secretary's action.

STATEMENT

The following facts were found by the Court of Claims in its amended special findings:

On May 18, 1917, petitioner entered into a contract, known as the General Supply Committee contract, with the Secretary of the Treasury, who was exclusively authorized by law to make such contracts (Sec. 4, Act of June 10, 1917, *supra*), which provided that the petitioner would "at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia" for the fiscal year ending June 30, 1918, and would install and maintain the necessary telephone equipment at certain rates and rentals named therein. This contract was similar in all material respects to that entered into for the preceding fiscal year. Under these annual General Supply Committee contracts, petitioner furnished the necessary private branch exchange switchboards at a nominal rental of $24 per annum, its chief rental being derived from mileage charges upon station lines, charges for telephone stations, and local messages. (R. 13–14.)

The Mexican border troubles in 1916 and the unrestricted German submarine policy early in 1917 marked the beginning of increased telephone activities at the War Department. The three-position No. 4 switchboard then in use, equipped to handle two hundred and eighty lines, was replaced about a month before this country entered the World War by a five-position board. Although four additional positions were added to the board it proved inadequate, and on October 1, 1917, a twelve-position 604 type board, equipped to handle one thousand lines, was installed. Additions were made to this board and by the spring of 1918 it consisted of forty-two operators' positions, with equipment for forty-two hundred lines, which was about the limit to which this type of equipment could be expanded. (R. 17–18.)

By November, 1917, petitioner's officers foresaw that due to war conditions the requirements of the War Department for telephone service would exceed the line capacity of the No. 604 type switchboard and that it would be necessary to provide more adequate switchboard equipment. They accordingly conferred with John C. Scofield, Assistant to the Secretary of War and Chief Clerk of the War Department, and Arthur D. Scovell, Director of Telephones for the War Department, and also with a committee appointed by the Secretary of War to consider the question of the floor space which would be required for the new equipment. There being no space then available, the War Department decided

to erect a separate building, and the petitioner's officials cooperated with the War Department in the preparation of plans for such building. Petitioner also submitted to the Secretary of War blue prints showing on the floor plans of the proposed building, the location and arrangement of the switchboard equipment it planned to install. These plans were approved and returned to the petitioner, and petitioner gave final orders to the manufacturers for the proposed switchboard and equipment. Petitioner's District Manager then consulted with petitioner's Chief Engineer who had been sent down from New York to take charge of the Government situation and to whom the District Manager reported, and "told him the whole installation ought to be held up until they got a written order." The Chief Engineer, however, objected to such a course and told the District Manager that "they wanted to do everything possible for the Government, and would take their chances of getting paid," and notified the District Manager "to go ahead with the installation." Prior to installing the switchboard and equipment, petitioner advised Mr. Scofield, Chief Clerk of the War Department, and also Mr. Scovell, Director of Telephones for the War Department, "that it expected the Government to pay the cost of the new switchboard less salvage." The pertinent findings are, however, that Mr. Scovell "had no power to bind the Government in the matter of contract and was not in any sense a contracting officer," that "Mr. Scofield

never represented to plaintiff's representative that the War Department would pay for the installation or costs of or losses on the new switchboard, nor did he prior to the installation notify the plaintiff that he would not pay for the same," that the Secretary of War "made no agreement with plaintiff to pay for the switchboard, never personally authorized such payment, never heard it suggested, and did not know until after the armistice that plaintiff contemplated submitting claim for the same;" and that neither the Secretary of War nor Mr. Scofield at any time approved payment for the switchboard, and "the War Department did not recognize the claim of an agreement with plaintiff to pay for the switchboard other than by way of the usual rental provided for in the General Supply Committee contract." (R. 19–22, 25.)

The building to house the new switchboard and equipment was erected by the War Department at a cost of $138,000, the petitioner contributing $8,000 to avoid any impairment in the construction. This was in line with the previous practice as the petitioner "had always theretofore provided at its own expense the necessary telephone switchboard and equipment for use at the War Department," and the Government "had always provided the necessary space for such switchboards and equipment." (R. 19.)

The new board was installed and service transferred to it on June 22, 1918. (R. 22–23.) For transferring the service to the new building peti-

tioner submitted to the War Department a bill for $35,917.05 which stated that it covered the cost of labor and material involved in accordance with the provisions of the General Supply Committee contract. The War Department paid the bill. (R. 23–24.)

Like the switchboards theretofore used in the War Department, the new switchboard (called in the Findings a "No. 1" switchboard) although larger, more costly, and of a different type, was a common battery private branch exchange switchboard and possessed the same general features as the preceding board. It was a forty-five position board, cost $401,113.34, was expanded by the time of the Armistice to a seventy-five position board, and served the sixty-five buildings in the District of Columbia in which the War Department was housed during the war. (R. 22–25, 28.)

Nine days after the new board was installed, the new General Supply Committee contract for the fiscal year beginning July 1, 1918, became effective. This contract was similar in most respects to the preceding contracts. It provided, however, for increased rates, including an additional switchboard charge for multiple jacks which amounted to $10,153.56 for the succeeding twenty-nine months the new board was in service. (R. 16–17, 24.)

After the new switchboard was installed, petitioner continued to submit bills to the War Department on the same rental basis of $24 per year as

it had in the case of the old switchboard. (R. 23–24.)

The revenue received by the company under the General Supply Committee contracts increased from $5,714.77 for the year ending June 30, 1917, to $338,824.60 for the year ending June 30, 1919. The gross revenue, excluding long distance tolls during the period in which the switchboard was in service, aggregated $534,418.83. The long distance tolls for incoming and outgoing calls for that period approximated $964,248, the bulk of which went to the American Telegraph and Telephone Company and its other subsidiaries of the Bell System. (R. 27.)

The company's net loss on the new switchboard was $135,691.57, if separated from the total revenue under the General Supply Committee contracts. (R. 29.)

The American Telegraph and Telephone Company, of which petitioner is a subsidiary, regarded the problem of increased telephone service at the War Department to be largely its own and not solely that of the petitioner, and in 1919 it contributed to petitioner an amount sufficient to cover its loss upon the switchboard in question as well as on other war time equipment. (R. 20, 25–26.)

After the Armistice the telephonic needs of the War Department began to decrease and the switchboard was gradually dismantled. On January 1, 1921, it was completely removed. (R. 23.)

In accordance with the Dent Act, petitioner submitted a claim to the War Department for the difference between the cost and salvage value of the switchboard. This claim was rejected by both the Board of Contract Adjustment and the Secretary of War. (R. 28.) The Court of Claims, with two judges dissenting, likewise held that petitioner was not entitled to recover.

ARGUMENT

Section 4 of the Act of June 17, 1910, *supra*, provides specifically that telephone, electric light and power service for the various executive departments in the District of Columbia shall be obtained by the Secretary of the Treasury upon annual contract, instead of by the several departments. The two clauses upon which petitioner relies as qualifying the Secretary's power, viz, "when the public exigencies do not require the immediate delivery of the *article*," and "*Provided*, that the *articles* intended to be purchased in this manner are those in common use or suitable to the ordinary needs of two or more such departments or establishments," have, we submit, no reference to the obtaining of telephone, electric light and power service. The "articles" to which those clauses relate are specifically mentioned: fuel, ice, stationery, and other miscellaneous supplies. Telephone service, electric light service and power service are covered specifically in a subsequent clause of the same section. It therefore appears that the Secretary of

the Treasury had the sole authority to contract for such telephone service as was required by the various executive departments in Washington, including the War Department.

Pursuant to the statute, the Secretary of the Treasury, after the United States had entered the war, made a contract with the petitioner for the fiscal year ending June 30, 1918, during which year the switchboard in question was installed, which leaves no doubt that it was intended to cover all telephone service for all of the executive departments in Washington, including the necessary equipment. It provides specifically that the petitioner "will, at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia, for a term of one year beginning July 1, 1917," and that petitioner "will install, equip, and maintain such telephone equipment as may be required in the District of Columbia, and furnish service in connection therewith" at certain specified rates and rentals. (R. 13–14.) Private branch exchange switchboards were furnished at a nominal rental of $24 per annum, but the findings explain that this was because it was the policy of petitioner to look for its principal revenue to other sources—mileage charges upon station lines, charges for telephone stations, and local messages. (R. 13.)

Petitioner contends, however, that as the switchboard was unusual in size, type and cost, it was not

such a board as was contemplated by the General Supply Committee contract, and that as the Government used the board, though without promise of payment, after the petitioner had advised the War Department that it would expect payment for the same, there arose an agreement implied in fact on the part of the Government to pay the cost of the board, less the salvage value thereof.

The findings show, however, that the switchboard, though larger and of a different type than the preceding switchboards, was still a private branch exchange switchboard possessing the same general features as the one it replaced; that after the switchboard was installed the petitioner billed the War Department for the board at the same nominal annual rental of $24; that the petitioner pursuant to the terms of the General Supply Committee contract collected from the Government $35,000 for changing the switchboard service from the old board to the new one; that it may be presumed that the parties intended to meet the emergency telephone expenditures of the petitioner by way of increases in rates rather than by the Government paying the cost of the equipment less salvage, as evidenced by the new General Supply Committee contract which became effective nine days after the switchboard was installed; that in erecting a building to house the equipment the Government was fol'owing a well-established policy, viz, that the Government should provide the necessary space, and the petitioner should at its own ex-

pense furnish the switchboard and equipment; and that because of the large revenues involved, and the importance of adequate communication with the seat of war, the Bell system, of which petitioner was a subsidiary, regarded the problem of increased service at the War and other Departments as much its own as that of the Government.

Furthermore, all switchboards and telephone service had been previously secured and paid for only under the terms of the General Supply Committee contract. After petitioner advised the War Department that the new and larger switchboard would be necessary to meet its increased telephone requirements, petitioner's officials informed Mr. Scofield that they would expect payment of the cost of the board less salvage, but Mr. Scofield made no promises in the matter. One of the telephone officials suggested that the whole installation should be held up until a written order for same could be obtained from the War Department, but on failure to secure such an order it was decided that "they * * * would take their chances of getting paid," and petitioner proceeded with the installation. (R. 21.) These facts negative any suggestion that there was a tacit or implied agreement to pay for the switchboard even on the theory of silence. True, the War Department used the switchboard, but only in the same manner that it had used all preceding switchboards. (R. 24.)

Assuming that he would have had such authority, despite the Act of June 17, 1910, there is no show-

ing in the findings that any responsible official of the War Department either ordered the installation of the switchboard, or gave any promise to the petitioner that the Government would pay for it. The findings at most show nothing more than a mere approval of the location and arrangement of the board. As the Court of Claims has said (R. 30–31):

> It is * * * clear from the facts found that the Secretary of War made no agreement with the plaintiff to pay for the switchboard, never authorized such payment, never heard it suggested, and did not know that the plaintiff contemplated submitting a claim for the same until after the armistice. Mr. Scofield, who, if anyone under the Secretary of War, had authority to make such a contract, never stated to plaintiff's representative that the War Department would pay for the installation of or losses on the new switchboard, and the department never recognized the claim of an agreement with the plaintiff to pay for the switchboard other than by way of the usual rental provided for in the general supply contract.

The only other War Department official named in the findings is Mr. Scovell, Director of Telephones, and the findings show specifically that he "had no power to bind the Government in the matter of contract and was not in any sense a contracting officer." (R. 20.)

To recover under the Dent Act, the burden was upon the petitioner to establish a contract implied

in fact as distinguished from one implied in law. *Baltimore & Ohio R. R. Co.* v. *United States,* 261 U. S. 592, 596. It is submitted that under the findings petitioner has failed to sustain that burden.

Much of the reasoning of the minority opinion is based upon evidence not embodied in the findings of fact. It is well settled that the evidence may not be resorted to for the purpose of "eking out, controlling or modifying" the scope of the findings of the Court of Claims. *Brothers* v. *United States,* 250 U. S. 88, 93.

CONCLUSION

The case was rightly decided below and presents no question justifying review on certiorari. The petition for certiorari should therefore be denied.

Respectfully submitted.

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No. 389

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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THE CHESAPEAKE & POTOMAC TELEPHONE COMPANY, petitioner

v.

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The majority and dissenting opinions in the Court of Claims have not yet been reported. The majority opinion will be found at pages 29–31 of the record; the minority opinion at pages 31–41.

JURISDICTION

The Court of Claims entered judgment in this case on June 10, 1929. (R. 41.) The petition for certiorari was filed September 10, 1929. (R. 42.) Certiorari was granted November 25, 1929. (R. 43.)

QUESTIONS PRESENTED

First. Did the Act of June 17, 1910, c. 297, Sec. 4, 36 Stat. 468, 531, vest in the Secretary of the Treasury the exclusive right to contract for the telephone service in use at the War Department in Washington, D. C., during the first part of the year of 1918?

Second. Is the petitioner entitled under the Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272) to recover upon a contract implied in fact, compensation not provided for in the General Supply Committee contract executed by the Secretary of the Treasury and the petitioner, for the difference between the cost and the salvage value of a large private branch exchange switchboard which was installed in the War Department on June 22, 1918, to meet the telephone requirements of that Department growing out of the World War and which was gradually dismantled after the Armistice?

STATUTES

Section 4 of the Act of June 17, 1910, c. 297, 36 Stat. 468, 531 (U. S. C. Title 41, Sec. 7), provides as follows:

> That hereafter all supplies of fuel, ice, stationery, and other miscellaneous supplies for the executive departments and other government establishments in Washington, when the public exigencies do not require the immediate delivery of the article, shall be advertised and contracted for by the Sec-

retary of the Treasury, instead of by the several departments and establishments, upon such days as he may designate. There shall be a general supply committee in lieu of the board provided for in section thirty-seven hundred and nine of the Revised Statutes as amended, composed of officers, one from each such department, designated by the head thereof, the duties of which committe shall be to make, under the direction of the said Secretary, an annual schedule of required miscellaneous supplies, to standardize such supplies, eliminating all unnecessary grades and varieties, and to aid said Secretary in soliciting bids based upon formulas and specifications drawn up by such experts in the service of the Government as the committee may see fit to call upon, who shall render whatever assistance they may require. The committe shall aid said Secretary in securing the proper fulfillment of the contracts for such supplies, for which purpose the said Secretary shall prescribe, and all departments comply with, rules providing for such examination and tests of the articles received as may be necessary for such purpose; in making additions to the said schedule; in opening and considering the bids, and shall perform such other similar duties as he may assign to them: *Provided,* That the articles intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments; but the said Secretary shall

> have discretion to amend the annual common supply schedule from time to time as to any articles that, in his judgment, can as well be thus purchased. In all cases only one bond for the proper performance of each contract shall be required, notwithstanding that supplies for more than one department or government establishment are included in such contract. Every purchase or drawing of such supplies from the contractor shall be immediately reported to said committee. No disbursing officer shall be a member of such committee. No department or establishment shall purchase or draw supplies from the common schedule through more than one office or bureau, except in case of detached bureaus or offices having field or outlying service, which may purchase directly from the contractor with the permission of the head of their department: *And provided further,* That telephone service, electric light, and power service purchased or contracted for from companies or individuals shall be so obtained by him.

The Dent Act (Act of March 2, 1919, c. 94, 40 Stat. 1272), under which this suit was brought, provides in Section 1:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer

> or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation * * * for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law: * * *.

Section 2 of the Act, the only other material section, gives the Court of Claims jurisdiction where the claimant is dissatisfied with the Secretary's action.

STATEMENT

The amended special findings of the Court of Claims establish the following facts:

Pursuant to Section 4 of the Act of June 17, 1910 (36 Stat. 531, pp. 2–4, *supra*), the petitioner entered into a contract with the Secretary of the Treasury, known as the General Supply Committee contract, which provided that the petitioner would "at its own risk and expense, furnish telephone service to all, any, or either of the departments or other offices or establishments of the Government in the District of Columbia" for the fiscal year ending

June 30, 1918, and would install and maintain the necessary telephone equipment at certain rates and rentals named therein. This contract was similar in all material respects to that entered into for the preceding fiscal year. Under these annual General Supply Committee contracts, petitioner furnished the necessary private branch exchange switchboards at a nominal rental of $24 per annum, its chief revenue being derived from mileage charges upon station lines, charges for telephone stations, and local messages. (R. 13–14.)

The Mexican border troubles in 1916 and the unrestricted German submarine policy early in 1917 marked the beginning of increased telephone activities at the War Department. (R. 17.)

The 3-position, No. 4, switchboard then in use, equipped to handle 280 lines, was replaced on March 23, 1917, by a 5-position board. (R. 17.) About the beginning of the World War (April 6, 1917) petitioner, anticipating an abnormal increase of the telephone business at the War Department, called its engineers together and planned to handle the prospective increase in business. Soon thereafter petitioner asked the War Department for additional space in which to install telephone facilities. (Finding XII, R. 20.) The telephone service increased rapidly and the new supply contract was entered into between the parties on May 18, 1917, for the fiscal year beginning July 1, 1917, and ending June 30, 1918. (R. 13.) The 5-position

board had been enlarged to 9 positions by August, 1917, prior to which petitioner ordered a 12-position, No. 604, type of switchboard to meet the anticipated requirements. (Finding VIII, R. 17–18.)

The latter board was placed in service in October, 1917, and by November, 1917, petitioner's officers foresaw that, due to war conditions, the requirements of the War Department for telephone service would exceed the line capacity of the No. 604 type switchboard and that it would be necessary to provide more adequate switchboard equipment. They accordingly conferred with John C. Scofield, Assistant to the Secretary of War and Chief Clerk of the War Department, and Arthur D. Scovell, Director of Telephones for the War Department, and also with a committee appointed by the Secretary of War to consider the question of the floor space which would be required for the new equipment. There being insufficient space then available, the War Department decided to erect a separate building, and the petitioner's officials cooperated with the War Department in the preparation of plans for such building. Petitioner also submitted to the Secretary of War blue prints showing on the floor plans of the proposed building the location and arrangement of the switchboard equipment which it planned to install. These plans were approved and returned to the petitioner, and petitioner gave final orders to the manufacturers for the proposed switchboard and equipment. Petitioner's District

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Manager then consulted with petitioner's Chief Engineer who had been sent from New York to take charge of the Government situation and to whom the District Manager reported, and "told him the whole installation ought to be held up until they got a written order." (R. 18–22.)

The Chief Engineer objected to such a course and told the District Manager that "they wanted to do everything possible for the Government, and would take their chances of getting paid," and notified the District Manager "to go ahead with the installation." Prior to installing the switchboard and equipment, petitioner advised Mr. Scofield, Chief Clerk of the War Department, and also Mr. Scovell, Director of Telephones for the War Department, "that it expected the Government to pay the cost of the new switchboard less salvage." The pertinent findings are definite that Mr. Scovell "had no power to bind the Government in the matter of contract and was not in any sense a contracting officer"; that "Mr. Scofield never represented to plaintiff's representative that the War Department would pay for the installation or costs of or losses on the new switchboard, nor did he prior to the installation notify the plaintiff that he would not pay for same"; that the Secretary of War "made no agreement with plaintiff to pay for the switchboard, never personally authorized such payment, never heard it suggested, and did not know until after the armistice that

plaintiff contemplated submitting claim for the same"; and that neither the Secretary of War nor Mr. Scofield at any time approved payment for the switchboard, and "the War Department did not recognize the claim of an agreement with plaintiff to pay for the switchboard other than by way of the usual rental provided for in the General Supply Committee contract." (R. 19, 21–22, 25.)

The building to house the new switchboard and equipment was erected by the War Department at a cost of $138,000, the petitioner contributing $8,000 to avoid any impairment in the construction. This was in line with the previous practice, as the petitioner "had always theretofore provided at its own expense the necessary telephone switchboards and equipment for use at the War Department," and the Government "had always provided the necessary space for such switchboards and equipment." (R. 19.)

The new board was installed and service transferred to it on June 22, 1918. (R. 22–23.) For transferring the service to the new building petitioner submitted to the War Department a bill for $35,917.05, which stated that it covered the cost of labor and material involved in accordance with the provisions of the General Supply Committee contract. The War Department paid the bill. (R. 23–24.)

Like the switchboards theretofore used in the War Department, the new switchboard (called in

the Findings a "No. 1" switchboard), although larger, more costly, and of a different type, was a common battery private branch exchange switchboard and possessed the same general features as the preceding board. It was a 45-position board, cost $401,113.24, was expanded by the time of the Armistice to a 75-position board, and served the sixty-five buildings in the District of Columbia in which the War Department was housed during the war. (R. 22–25, 28.)

Nine days after the new board was installed the new General Supply Committee contract for the fiscal year beginning July 1, 1918, became effective. This contract was similar in most respects to the preceding contracts. It provided for increased rates, including an additional switchboard charge for multiple jacks, which amounted to $10,153.56 for the succeeding twenty-nine months the new board was in service. (R. 14–17, 24.)

After the new switchboard was installed, petitioner continued to submit bills to the War Department on the same rental basis of $24 per year as it had in the case of the old switchboard. (R. 24.)

SUMMARY OF ARGUMENT

I. Under the Dent Act, upon which petitioner's suit is based, the facts must show dealings by representatives of the Government authorized to contract. Under the Act of June 17, 1910, the Secretary of the Treasury was the person exclusively

authorized to enter into contracts for telephone service.

II. The findings do not establish any contract implied in fact. The whole subject was covered by a written contract then in existence, and an implied contract may not exist where there is an express contract.

III. Petitioner's attitude showed that it did not understand that the Government implied that it would pay for the switchboard. Although petitioner notified representatives of the Government that petitioner expected payment for the cost of the new branch exchange switchboard less salvage, no representative of the Government stated that the Government would pay for it, and thereafter petitioner apparently recognized the applicability of the existing written contract by making charges under it for the installation of new equipment, for multiple jacks, and for rental. The fact that the annual rental was only $24 is immaterial, as the policy of petitioner had always been to charge merely a nominal rental and to derive its revenue from other sources.

IV. The situation which gave rise to the necessity for the new switchboard was not one which could not have been foreseen at the time when the General Supply contract for the period in question was executed. During 1917 and 1918 there had been seven new installations of equipment, some of which had been extremely costly. No additional charge on ac-

count of these installations was ever suggested. Petitioner foresaw the necessity of this switchboard months before it was installed and ordered it before it suggested that the Government should pay for it.

V. The new equipment was of the kind and type provided for in the written contract. The War Department inspected and approved the plans and specifications for the equipment because it was constructing a building to house it, and this action can not be construed as an admission that the Government was liable to pay for the equipment.

VI. The Government did not become liable for the cost of the switchboard by virtue of use of it after a bill for it had been presented. Petitioner was under obligation to furnish such equipment under its written contract.

VII. The petitioner was reimbursed by its parent company, the American Telephone & Telegraph Company, for the expense of this switchboard, upon the ground that such expense was an expense of the general telephone business and the income of both the parent company and petitioner was largely augmented by the increased business resulting from the installation of the new switchboard.

ARGUMENT

I

NONE OF THE GOVERNMENT OFFICIALS INVOLVED HAD ANY AUTHORITY TO CONTRACT

Petitioner's suit is based upon the Dent Act. (40 Stat. 1272.) Under the Dent Act, for claimant to

prevail, the facts must show a contract with Government officials competent and authorized to contract, and the facts relied on must establish a contract implied in fact, as distinguished from one implied in law. *Balt. & Ohio R. R.* v. *United States,* 261 U. S. 592, 597, 599; *Jacob Reed's Sons* v. *United States,* 273 U. S. 200, 202.

The Government contends that neither of these situations is established by the findings of the court below, and its findings, whether of facts or of mixed questions of law and fact, are conclusive on this Court. Statements in the opinion can not be considered. *United States* v. *Swift & Co.,* 270 U. S. 124; *Brothers* v. *United States,* 250 U. S. 88, 93.

We submit that the findings of the court below show that there was no contract with Government officials capable of, or intending to, contract, and that no contract, either in fact or implied in fact, is established by the findings.

As to the officials involved: On the Telephone Company's side appears alone Charles T. Clagett, petitioner's District Manager having charge of its business office, who looked after collections, the ordering of telephones, and all business pertaining to the public, including the Government's contractual relations with the Telephone Company. (R. 21.)

The Government's representatives who dealt with Clagett were Scovell and Scofield. The find-

ings recite that Scovell "had no power to bind the Government in the matter of contract and was not in any sense a contracting officer." (R. 20.) Scofield was Assistant to the Secretary of War and Chief Clerk of the War Department; he had supervision of the telephone and telegraph division, and ranked next to the Secretary of War in the control of that service, which was under his general direction. (R. 19.)

Under the Act of June 17, 1910, pp. 2–4, *supra*, which provides for the furnishing of telephone service to all departments of the Government, the Secretary of the Treasury was exclusively authorized by law to enter into contracts for telephone service. Neither the Secretary of War nor his Assistant, Scofield, had any such power, and the court below found that "the War Department did not recognize the claim of an agreement with plaintiff to pay for the switchboard other than by way of the usual rental provided for in the General Supply Committee contract." (Finding XX, R. 25.)

Section 4 of the Act of June 17, 1910, *supra*, provides specifically that telephone, electric light, and power service for the various executive departments in the District of Columbia shall be obtained by the Secretary of the Treasury upon annual contract instead of by the several departments. The two clauses upon which petitioner relies as qualifying the Secretary's power, viz., "when the public

exigencies do not require the immediate delivery of the *article,*" and "*Provided,* That the *articles* intended to be purchased in this manner are those in common use by or suitable to the ordinary needs of two or more such departments or establishments," have, we submit, no reference to the obtaining of telephone, electric light, and power service. The "articles" to which those clauses relate are specifically mentioned—fuel, ice, stationery, and other miscellaneous supplies. Telephone service, electric light service and power service are covered specifically in a subsequent clause of the same section. It therefore appears that the Secretary of the Treasury had the sole authority to contract for such telephone service as was required by the various executive departments in Washington, including the War Department. The word "so" in the proviso of that Act, that telephone service, etc., "shall be *so* obtained by him," refers to the method by which the United States shall obtain such service, and does not refer to the restrictions surrounding the articles mentioned.

A further reason why the telephone and power service clause is not subject to the preceding restrictions is that advertisement is obviously not contemplated in contracting with such noncompetitive concerns. Also in view of the fact that seven months were required to order and install such a switchboard, there was no such requirement for immediate delivery as to prevent petitioner from having ample

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time to make any necessary contracts with the Secretary of the Treasury upon the subject. And such written contracts were thus actually entered into.

Petitioner confuses telephone *service* with the telephone *switchboard,* which is merely part of the equipment necessary to the furnishing of adequate telephone service to the War Department. Regardless of the varying sizes and types of the necessary switchboards, the service still remains telephone service as provided in the Act. Furthermore the switchboard herein involved was furnished under these Supply Contracts, exactly as had been all other preceding installations. (See pp. 22–23, *infra.*) The acts of the Telephone Company indicate that it did not entertain the belief that the Government expected to pay for this board, except as the controlling Supply Contracts provided. (See pp. 18–20, *infra.*)

Apparently since the passage of the statute in 1910 (36 Stat. 468, 531), *all telephone service of whatever kind, nature, or amount* has been furnished to the different departments of the Government of the United States under these written contracts entered into on behalf of the United States by the Secretary of the Treasury. Certainly there was such a contract with this petitioner during the time involved in this litigation. (R. 13–14.)

Although the Government contends that under the provisions of the 1910 Act the Secretary of the

Treasury had exclusive authority to contract for telephone service, the contention is not vital to the Government's case here because even if power to contract for telephone service was not exclusively vested in the Secretary of the Treasury, and the Secretary of War also had such right, nevertheless the point is not open to petitioner because it did actually enter into a written contract with the Government through the Secretary of the Treasury. Therefore, such written contract being in existence, whether or not the Secretary of War might possess also the power to contract would not free petitioner from the obligations assumed in the written contract which it did enter into.

II

THE FINDINGS DO NOT ESTABLISH ANY CONTRACT IMPLIED IN FACT

Two objections to the existence of a contract implied in fact are the lack of authority of the Government's representatives to make a contract and the fact that there was no discussion of the time when the new equipment was to be furnished, or what it was to cost.

Moreover, there was no possible consideration for any such contract, inasmuch as the whole subject was covered by a written contract then in existence between the Government and the Telephone Company, under which the whole burden and expense of furnishing all telephone service, of whatever kind,

nature, or amount, to the United States was placed on the Telephone Company. An implied contract may not exist where there is an express contract. *Hawkins* v. *United States*, 96 U. S. 689, 697; *Perkins* v. *Hart*, 11 Wheat. 237. Consequently, Scofield was under no obligation to pay any attention whatever to petitioner's statement that it expected to be paid for the equipment in question.

This brings us to a discussion of the written contracts existing between the Telephone Company and the United States, for the purpose of noting the effect of those contracts, and the acts of the parties concededly done under them, upon the Telephone Company's claim here.

Under the contract in force from July 1, 1917, to June 30, 1918 (Finding III, R. 13–14), petitioner agreed to furnish telephone service "to all, any, or either of the departments or other offices or establishments of the Government." Could the obligation of the Telephone Company be fixed under broader or more comprehensive language? But the contract is even more explicit. It stated "that said company will install, equip, and maintain such telephone equipment *as may be required* in the District of Columbia," and in order that no possible contingency might be permitted to escape the sweeping scope of the contract, it was further provided that "should additional service or *equipment* be required * * * additional service or equipment will be furnished at the rates named herein." This

was the language of the contract in force from July 1, 1917, to June 30, 1918, and it is conceded that the telephone equipment for which the petitioner is here demanding payment was installed on June 22, 1918, within the time covered by this contract. (Finding XIV, R. 23.)

That the contract thus referred to was not a special contract entered into by petitioner under any failure to comprehend its scope, is shown by the fact that a similar contract was in force from July 1, 1916, to June 30, 1917. (R. 13.) After the new equipment was installed, on June 22, 1918, another contract was entered into between petitioner and the United States, containing the same broad clauses requiring petitioner to furnish telephone service to all departments of the Government "at its own risk and expense," and to "install equip, and maintain *such telephone equipment as may be required.*" (R. 14.) Indeed, the new contract, covering the precise period during which the petitioner was using this new equipment, contained even more drastic clauses with respect to the rights of petitioner. It provided that "should the subscriber desire any other service or *equipment* not specified herein, the company's rates and regulations filed with the Public Utilities Commission of the District of Columbia will apply," and then contained the significant clause that "the Secretary of the Treasury, by accepting rates and terms herein stated on behalf of the subscriber, agrees

that the equipment *now in service* is covered by this contract." (R. 16.)

This new contract became effective nine days after the new switchboard was installed. We submit that petitioner can not, in the face of these provisions, which treat the equipment as the property of petitioner, consistently contend that it had sold the switchboard to the Government. Neither may the Telephone Company properly contend that such new contract does not cover or apply to the switchboard which had thus been furnished under the immediately preceding contract, because under the new contract the Telephone Company was receiving the contract rental and other applicable rights provided for in the new contract.

III

PETITIONER'S ATTITUDE SHOWED THAT IT DID NOT UNDERSTAND THAT THE GOVERNMENT IMPLIED THAT IT WOULD PAY FOR THE SWITCHBOARD

The Government insists that the Telephone Company did not, prior to the installation of the new equipment or even while the new equipment was being used after installation, believe or understand that the new equipment was not covered by the provisions of the General Supply Contracts above referred to. It billed the United States the expense of the physical installation of the new equipment in the new building provided therefor by the Government. As it is now the contention of petitioner that this new equipment had nothing to do

with the General Supply Contract, it is significant that in submitting its bill for over $35,000 for the expense of installation of the new equipment it stated that the bill "covered the cost of the labor and material involved *in accordance with the provisions of the General Supply Committee contract.*" (Finding XVI, R. 23–24.) And that this significant language was not a mere oversight is shown by the fact that, after the new equipment had been installed, petitioner collected *rental charges* for such new equipment at the rates fixed by the General Supply Committee Contract then in force. (Finding XVI, R. 24.) Furthermore, when multiple jacks (a switchboard accessory) were added to the new equipment, these multiple jacks were charged for under the specific provisions of the General Supply Committee Contract then in force, and the Government paid the Telephone Company more than $10,000 for the same. (Finding XVI, R. 24.)

The Government furnished the operators for the new equipment, as it had under former installations of new equipment, and it defrayed the expense of physically installing the new equipment, as it had in the past when new equipment was installed.

The theory of petitioner seems to be that the Government was *purchasing* the switchboard in question, but the findings indicate that to the end petitioner treated the switchboard as its own property, because it apparently sold the board on its own responsibility, and simply reported to the

United States the amount which it had received as salvage. (Findings XXVIII and XXIX, R. 28–29.)

Likewise, during the period of government control the Telephone Company was allowed eight per cent on the cost of this switchboard—a fact which is, we submit, antagonistic to the Company's present contention that the switchboard had, in effect, been purchased by the United States, and therefore belonged to the United States and not to the Telephone Company.

It therefore seems highly probable that petitioner, as well as the Government, understood at the time of and after the installation of the new equipment that it was furnished under the applicable General Supply Committee Contract.

Petitioner stresses the fact that Clagett advised Scofield that "it expected the Government to pay the cost of the new switchboard less salvage," and insists that the fact that Scofield did not notify petitioner that the Government would not pay for the switchboard constitutes such a silence on the part of Scofield as to amount to assent. No one in behalf of the Government ever gave any express assent. Aside from the fact that the Secretary of the Treasury, and not Scofield, was the only person having authority to enter into contracts for telephone service, the Government contends that this contention on the part of petitioner is unsound.

In the first place, the Government knew that under petitioner's contracts petitioner was required to furnish all telephone apparatus found necessary to take care of the Government's telephone business; so felt that the suggestion of Clagett was irrelevant. In the second place, the Government knew that petitioner, in compliance with its contracts, had installed without charge, seven new additional groups of equipment for the purpose of handling the constantly increasing business, getting its compensation therefor from the increase of business itself. (See pp. 25–26, *infra*.)

The fact that the annual rental charge for the new switchboard was only $24 is immaterial. The fact that the new switchboard cost approximately $400,000 is persistently presented by petitioner in connection with the annual rental fee of $24, fixed by the General Supply Committee Contract; and all of the changes are rung upon the seemingly unfair proposition that petitioner should be required to furnish apparatus costing $400,000 upon an annual rental of $24. Even the dissenting opinion in the court below presents this contention. (R. 36.) The annual rental fee provided in these contracts has never had anything whatsoever to do with the cost of the apparatus thus furnished. The rental fee was a nominal fee, and was so regarded by the parties. The same rental fee was fixed in all of the telephone contracts entered into, and the findings expressly show that it was "the policy of the

plaintiff to charge merely a nominal rental for such equipment, while the chief revenue was being derived from other sources." (Finding II, R. 13.) The revenue from other sources thus referred to would include rentals, local tolls, and long-distance tolls. (For a further discussion of this consideration, see Point VII, p. 31, *infra.*)

IV

THE SITUATION WHICH GAVE RISE TO THE NECESSITY FOR THE NEW SWITCHBOARD WAS NOT ONE WHICH COULD NOT POSSIBLY HAVE BEEN FORESEEN WHEN THE APPLICABLE WRITTEN CONTRACT WAS ENTERED INTO

The history of the contractual relations between petitioner and the United States is significant.

As we have stated above, under the Act of 1910 the General Supply Committee Contracts have covered all of the arrangements for telephone service and equipment between petitioner and the United States. Under those contracts there was cast upon petitioner a constantly increasing burden, through the necessity for increased equipment and apparatus, in order to furnish satisfactory telephone service. It is true that the increase in such equipment prior to 1917 was much less than the increase thereafter, but the amount of increase becomes immaterial in contemplating what must have been the underlying attitude of petitioner toward the increase in equipment for the purpose of taking care of an increase in business, and the Government asserts that petitioner always under-

took, whenever it became necessary to take care of increased business, to furnish additional equipment under the terms of the regular contracts.

It is persistently contended by petitioner that the increase of business occasioned by the World War was not contemplated, foreseen, or appreciated by either petitioner or the Government, and that for that reason the existing contracts ceased to control the situation. But the contention can not be sustained in this case.

The findings disclose that about the time of the beginning of the World War petitioner, "anticipating an abnormal increase in the telephone business of the War Department called its engineers together and planned to handle the prospective increase in business." This was approximately six weeks before executing the new supply contract and over one year before the installation of the equipment here sued for. (Finding XII, R. 20.) The facts disclose that the Mexican Border troubles in 1916 accelerated telephone activities at the War Department, and with the announcement by the German Government, on January 31, 1917, of its new submarine policy, the necessity for increased equipment began in earnest. This occasioned a new installation which petitioner furnished under its regular contract charge. (Finding VII, R. 17.)

Four months later, in August, 1917, a second new installation was found necessary, and this also was charged for under the provision and rates fixed by the contract. (Finding VIII, R. 17–18.)

Two months later, on October 1, 1917, came a third installation, consisting of new equipment, "the largest and most modern type of private branch exchange equipment then on the market." (Finding VIII, R. 18.) How similar the description is to the description of the equipment here sued for!

One month later, on November 1, 1917, came a fourth new installation, and a month and a half later, on December 15, 1917, a fifth new installation, and less than a month later, January 9, 1918, a sixth new installation, and after that and prior to June 22, 1918, came a seventh installation, which brought the existing installation up to 4,200 lines. (Finding IX, R. 18.)

All of these seven new installations, the third of which was described in the comprehensive terms quoted above, were admittedly furnished under the General Supply Committee Contracts at the rates fixed in those contracts, without any suggestion on the part of petitioner that such was not its duty under these contracts.

Nor was the necessity for the particular new apparatus here involved, a sudden emergency call upon petitioner. In November, 1917, nearly eight months before the new apparatus was finally installed, petitioner became aware that larger, more extensive equipment was going to be necessary to take care of that which petitioner had agreed to take care of in the written contract which it signed on May 18, 1917, to wit, to "furnish telephone serv-

ice to all, any, or either of the departments * * * of the Government." (Findings III, X, R. 13, 18–19.) And without intimating to the Government that petitioner had any idea of changing the basis of charge on which it was furnishing equipment and service, petitioner in December, 1917, put in its order for the new equipment, so there might be no delay, and wrote the Secretary of War, under date of December 31, 1917, stating that the factory had been ordered to proceed "with the manufacture of the new War Department switchboard." And apparently it was not until January, 1918, that petitioner notified either Scovell or Scofield that petitioner expected to be paid. (Finding XIII, R. 21–22.)

So the Government contends that the sudden increase of business was fully contemplated by the Telephone Company, that it repeatedly increased its installations as the telephone needs increased, and that the final installation of the switchboard here involved was simply a further development of the obligation assumed by the Telephone Company in the contracts executed by the Company after the war had begun and after the necessity for increased service and equipment had become perfectly apparent. This condition may not, we insist, be deemed such a sudden emergency call as should free the Telephone Company from the binding effect of the written contracts under which it agreed to furnish all necessary service and equipment during the period covered by the contracts.

V

THE NEW EQUIPMENT WAS OF THE KIND AND TYPE PROVIDED FOR IN THE WRITTEN CONTRACT

Attempt is made to show that there was something so unique and extraordinary in the character of the new equipment here involved that it should be considered as radically different from any equipment previously furnished. The Government insists there is nothing in this contention. The findings show that *each* new installation made by petitioner to take care of increased business necessitated a type of switchboard different from that replaced. (Finding VII, R. 24.) Although the latest equipment was larger and would handle more lines and cost considerably more than the one previously furnished, nevertheless the new board and the one superseded were used for identical purposes and "possessed the same general features and were both common battery private branch-exchange switchboards." (Finding XVII, R. 24.) But we submit that it would make no difference if the new equipment was of a different kind or character, inasmuch as petitioner had agreed in its contract to furnish all service and all equipment necessary to take care of the Government business, and the history of the matter shows that the Telephone Company was fully apprised of the constant increase in business and the necessity of a constant increase in equipment facilities. The petitioner had

the duty to furnish increased service and increased equipment, and this did not change under the contract simply because of an unprecedented demand for additional service.

Another argument which is advanced to support petitioner's claim for payment for this new equipment is based upon the action of the United States in erecting a new building for the purpose of housing such new telephone equipment. The argument is unconvincing. It has always been the duty of the Government to provide building space within which the Telephone Company might establish the equipment which it was furnishing under its yearly contracts. The available space in the War Department building was exhausted by the seven new installations which had been made to take care of the business. (Finding XI, R. 19.) No more room was available in the existing building, but the necessity for telephone service, both existing and prospective, was constant. The installation of larger apparatus to take care of this increased business would take some time. It was impossible to contemplate the dismantling of the existing equipment, for a single minute, unless other equipment was instantly available for use. It necessarily followed, therefore, that the existing installation must continue to function until the new, enlarged unit could be installed and connected. There being no more space in the existing building,

new construction was necessary, and this new construction was carried out by the United States, not because of any idea that the United States was obligated to pay for telephone equipment, but simply to carry on the ordinary, always-existing duty on the part of the Government to furnish space wherein the Telephone Company might install its equipment. That the Telephone Company fully realized that the construction of this new telephone building did not remove the situation from the purview of the existing written contracts between itself and the Government, is clearly indicated by the fact heretofore alluded to, that the Telephone Company, *under the provisions of the General Supply Contract then in force,* collected from the United States over $35,000 for installation of the new equipment in the new building. (Finding XVI, R. 23.) And it was because the Government was constructing a building to house the telephone equipment which the petitioner was to furnish that the plans and specifications of the equipment were exhibited to the Government, in order that the building, when constructed, might physically be sufficient to take care of such new apparatus. The approval of such plans by the War Department can not be construed as an admission that the Government was liable for the first time in its contracts with petitioner, for the cost of new, necessary equipment.

VI

THE GOVERNMENT DID NOT BECOME LIABLE FOR THE COST OF THE SWITCHBOARD BECAUSE OF THE USE OF IT AFTER A BILL FOR IT WAS PRESENTED

The Government was entitled to service from the new apparatus, regardless of the bill presented by that company. Petitioner insists that, because the Government continued to use the switchboard in question after petitioner had submitted a bill or bills against it for the cost of such switchboard, such continued use renders it liable to pay the bill. Under the Telephone Company's contracts with the Government, it was obligated to furnish all and sufficient telephone service, and the switchboard in question was simply equipment furnished by the Telephone Company as a means of furnishing that service. In furnishing this new switchboard, all that the Telephone Company was doing was what it had agreed to do under its contract.

VII

THE COST OF THIS NEW EQUIPMENT WAS BORNE BY PETITIONER'S PARENT COMPANY AS A PART OF THE GENERAL TELEPHONE BUSINESS

We have suggested above that the acts of the Telephone Company clearly show that it did not really contemplate that the United States either did, or should, agree to buy this switchboard, but that, on the contrary, the Company proceeded under the apparent assumption that the furnishing of the increased service, as well as the increased equip-

ment, was a duty of the Company as one of the general obligations of the telephone business, as a national industry, as distinguished from an installation at the expense of the subscriber, the subscriber to own the equipment.

On this point, we submit that the findings disclose that the general attitude of the telephone industry as a unit undermines the contention that petitioner was really expecting the United States to pay for new equipment because of an increase in requirements due to sudden war conditions.

Petitioner is a subsidiary of the American Telephone & Telegraph Company, which is the parent company. This parent company "considered the problem of increased telephone service at the War Department to be largely *its own* problem." (Finding XII, R. 20.) Consequently, the parent company sent its representatives to Washington to assist petitioner in furnishing service and procuring equipment. (Finding XII, R. 20.) Scovell went into the employ of the Government, his salary being paid by the New York Telephone Company, also a subsidiary of the parent company. (Finding XII, R. 20.)

In furtherance of such general control policy, after the war was over and business had again become normal, the American Telephone & Telegraph Company contributed to petitioner the sum of $1,250,000, which petitioner had been compelled to expend "in order to meet the late war emergency

to make large and extraordinary expenditures on account of plant that would not have been otherwise necessary at this time or in the immediate future," and further stated that such large and extraordinary expenditures "arose out of the requirements of the telephone service of the entire Bell system, and not solely out of the requirements of the telephone service" of the petitioner. (Finding XXI, R. 25–26.) *This $1,250,000 thus contributed included the sum of $328,166.56 specifically designated to apply to "P. B. X., Case No. 20, War Department,"* which means "Private Branch Exchange, Case No. 20, War Department," and which is the specific equipment here sued for. (Finding XXIII, R. 26, 27.)

And there is every reason for fully understanding the propriety of the position thus taken by the parent telephone company. Increased service means increased business to the parent company as well as to the subsidary, and increased business means increased earnings, all of which the findings amply demonstrate.

The Telephone Company is complaining because it had to furnish expensive, new apparatus to take care of increased business, for the *rental* of which new apparatus it was to receive but $24 per year. The record shows, in the first place, as we have shown, that the parent company fully reimbursed petitioner for the expense it went to in installing the new switchboard, yet while the new switchboard

was in use the Bell System received over $945,000 for long-distance tolls, out of which petitioner received approximately $145,000. (Finding XIV, R. 27.) Exclusive of these tolls, the gross revenue of petitioner, obtained from its contracts with the Government during the period when the new switchboard was in use, approximated $535,000. (Finding XXV, R. 27.) During the year preceding the war, the gross revenue, exclusive of tolls, was $5,714.77. (Finding XXV, R. 27.)

In addition to the foregoing, under the increase in rates granted by the Public Utilities Commission, covering the Government contract beginning July 1, 1918, which contract the Telephone Company now insists did not apply to the new switchboard, the Company's revenues increased by approximately $100,000. (Finding XVIII, R. 24.) In addition thereto, while the Government had control of petitioner's telephone business during the period of Government control, the Telephone Company was allowed approximately $80,000 as an annual carrying charge based on a percentage of the book value of the switchboard. (Finding XIX, R. 25.) This makes a total income, which the Telephone Company received from the Government under its contracts with the Government, during the period that the new switchboard was in use, of approximately $860,000. This amount is without taking into consideration the payment by the United States to the Telephone Company, upon the

conclusion of Government control, of an amount exceeding $1,300,000, which included eight per cent return on the Telephone Company's stock during the period of Government control. (Finding XXVII, R. 28.)

The happening of a single contingency prevented the supplying of new apparatus from resulting in the most extraordinary increase in the profits of petitioner, *and that contingency was that the war stopped too soon,* and that contingency was something which, under petitioner's contracts with the Government, petitioner, and not the United States, should face.

CONCLUSION

We submit that the judgment of the Court of Claims should be affirmed.

Respectfully submitted.

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CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 389.—October Term, 1929.

The Chesapeake & Potomac Telephone Company, Petitioner, *vs.* The United States.	On Writ of Certiorari to the Court of Claims.

[May 5, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit under the Dent Act, March 2, 1919, c. 94, 40 Stat. 1272, to recover upon a contract said to be implied in fact, to pay the cost of installing a very large telephone switchboard for the War Department during the late war, less the amounts realized from the parts when the switchboard was removed. The Court of Claims dismissed the petition, and a writ of certiorari was granted by this Court.

The decision of the Court of Claims went upon the ground that the installation was covered by a written contract between the plaintiff and the Secretary of the Treasury, (Act of June 17, 1910, c. 297; 36 Stat. 468, 531; U. S. Code, Tit. 41, § 7,) and that there was no subsequent contract enlarging the obligation of the Government; it being expressly found that the only persons to whom any suggestion was made that additional pay was expected had no authority to bind the Government, *Jacob Reed's Sons* v. *United States*, 273 U. S. 200, 202; *Baltimore & Ohio R. R. Co.* v. *United States*, 261 U. S. 592, 596, and that the Secretary of War never heard the suggestion or knew that a claim would be made until after the armistice. We are of opinion that on the findings the decision was right.

The contract in force when the work was completed, June 22, 1918, bound the Telephone Company to "install, equip, and maintain such telephone equipment as may be required in the District of Columbia, and furnish service in connection therewith" at rates set forth, one item being "common battery private branch

exchange switchboards, including one operator's set of telephones for each operator's position, each, per annum, $24.00." Although it is argued that neither the Act of June 17, 1910, c. 297, nor the contract covered this unusually large switchboard, we think it too plain for discussion that the words used, taken literally, covered it in terms. The only suggestion that needs a short answer is that this work was so wholly outside anything that was contemplated that a special agreement was necessary or at least just. But war had been approaching and large additions had been made without question until after war was declared, April 6, 1917. A little later the present structure was placed in a separate building erected for it by the United States. The understanding of the parties is shown by the fact that a contract with similar terms was made for the next year on September 25, 1918. The plaintiff sent in and was paid bills for rental at the old rate, for increased rates for the lines and stations, and other unquestioned bills, without any attempt to charge for the expenses of the new structure. The explanation of the slight charges for rentals is simple and makes the whole business clear. The settled policy of the Company was to rely for its chief revenue on mileage charges upon station lines, charges for telephone stations, and local messages. Had the war gone on another year probably it would have made a good deal of money. The American Telegraph and Telephone Company regarded the problem of increased telephone service at the War Department as largely its own, and in fact has more than reimbursed the plaintiff for its loss. When the plaintiff's district manager told his superior officer that the installation ought to be held up until they got a written order, he was told that they wanted to do everything possible for the Government and would take their chances of getting paid.

There is nothing upon which the Company can found a claim except that in January, 1918, it advised the person who was in charge of the telephone service of the War Department, but whose salary the plaintiff paid, and another under whose general direction the service was, that it expected the Government to pay the cost of the new switchboard, less salvage. There was no assent to this expectation, nor did these officers have any authority to give such assent, and as we have said there was neither assent nor knowledge on the part of those higher up. The fact that plans

of the building to be erected by the Government showing the switchboard and equipment proposed were submitted to the Secretary of War is no help to the plaintiff. Of course they were, whichever was to pay the bills. Neither was the continued use of the structure after the plaintiff had made its claims. The Government had to use it, and had the right to use it, whether the Government was bound to pay, or whether, as the plaintiff's engineer said to its district manager, the Telephone Company took the chances of getting paid. The Government had the plaintiff's contract and would have had the right to rely upon it even if it had been informed that the plaintiff was dissatisfied. It seems to us that the dissent of two of the Judges of the Court below is directed rather to the findings than to the statement of the law upon the findings as they stand. These are not open to question before us.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

Mr. Justice Stone took no part in the consideration or decision of this case.